FILE COPY

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 56.

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 14, 1960

PROBABLE JURISDICTION NOTED MAY 23, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 56

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 3, 1961

[fol. 334] EXHIBIT 22

September 9, 1959

Mr. J. L. Lister
Southern Music Publishing Company, Inc.
1619 Broadway
New York 19, N. Y.

Dear Mr. Lister:

Replying to your letter of September 8, the publishers referred to by Mr. Dean are:

The Edwin H. Morris companies;
The Famous-Paramount companies;
The Bourne companies, and
The Lou Levy companies.

Sincerely yours,

R. F. MURRAY

[fol. 337]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 13-95

UNITED STATES OF AMERICA, Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.

Transcript of Proceedings of October 19 and 20, 1959

Before: Hon. Sylvester J. Ryan, District Judge.

New York, October 19, 1959, 10 A.M.

APPEARANCES:

Richard B. O'Donnell, Esq., Walter K. Bennett, Esq., Albert Karsted, Esq., and John L. Wilson, Esq., Attorneys, Department of Justice, for the Plaintiff.

Arthur H. Dean, Esq., Howard T. Milman, Esq., Herman Finkelstein, Esq., Ferdinand Pecora, Esq., Lloyd Cutler, Esq., David H. Horowitz, Esq., Frederick A. Terry, Jr., Esq., and Thomas L. Finkelstein, Esq., Attorneys for Defendants.

[fol. 338] COLLOQUY BETWEEN COURT AND COUNSEL ON MOTIONS FOR LEAVE TO INTERVENE AND TO BE HEARD

The Court: We have the application of the United States of America, plaintiff, against American Society of Composers, Authors and Publishers, file number Civil 13-95. This application is made by both the plaintiff and the defendant for approval by the Court of a proposed amendment to the amended consent decree.

I understand it comes on with the consent now of both the plaintiff and the defendant?

Mr. O'Donnell: That's right, your Honor.

The Court: The Court provided by an order that it signed several months ago that notice of this application should be given to the members of the Society and that the proposed amendment to the amended consent decree should be duly promulgated. Has that notice been given?

Mr. O'Donnell: Yes, it has, your Honor.

The Court: And you have filed with the Court the affidavit showing compliance?

Mr. Milman: We have.

The Court: If not, I suggest you do so.

Mr. Milman: It has been done.

The Court: All right. During the interval I also directed, if not in a written order then in an order entered at [fol. 339] least orally, that any communications that were sent by the Society to its members be filed in the court. Has that been complied with?

Mr. Milman: That has been complied with, your Honor.

The Court: Now then, in the order, as I recall it, I provided that any interested party may today make application to be heard and I would then pass upon the application. Is there anybody here present, other than the plaintiff or the defendant, who desires to be heard by the Court?

Mr. Eastman: I do, your Honor.

The Court: State your name and address and whom you represent.

Mr. Eastman: My name is Lee V. Eastman of the firm of Eastman, Bronstein & Van Veen at 400 Madison Avenue, New York City, New York. I represent a group of roughly 60 writers, all members of ASCAP, who constitute themselves a committee called the Current Writers Committee. I should like to appear on their behalf.

The Court: Have you made a formal application of any nature?

Mr. Eastman: I have not, your Honor. I wrote you [fol. 340] a letter and you said you would deem that an application.

The Court: I take it then that you make no application to formally intervene in this suit.

Mr. Eastman: At this time I have not, your Honor.

The Court: Now, do I also understand that all of the individuals or corporations whom you represent here today are members of the defendant Society?

Mr. Eastman: They are, your Honor.

The Court: It seems to me then, being members of that Society you have surrendered your right to appear as individuals and you must be heard through the Society. However, to assist the Court I will permit you later on to make any comments or observations that you desire as a friend of the Court.

Mr. Eastman: Your Honor, I should like—

The Court: By doing that I don't recognize that you have any legal status or standing in this proceeding.

Mr. Eastman: Your Honor, on that point then I should like to move to intervene.

The Court: Your motion is denied. If you want a formal order on that, you may submit it. It is denied for the rea- [fol. 341] sons that I have indicated. You are not a party to this suit. The suit has gone to final decree and judgment, and you are still members of the defendant Society and have surrendered your right in so far as this suit is concerned to appear individually. However, I will permit you to be heard as a friend of the Court.

Mr. Eastman: Thank you, your Honor.

The Court: So that I might get the benefit of any observations that you may have to make. Your full name is what?

Mr. Eastman: Lee V. Eastman.

The Court: Have you filed any papers which shows the members of this committee?

Mr. Eastman: No, I have not, your Honor, but I would be very glad to do so.

The Court: I think it would be helpful if you did, if you stated just who are the members of this committee in some formal paper so that I might have it on the record, and whom this committee represents.

Mr. Eastman: Your Honor, we didn't have a file tabulation. That is why I did not file that.

The Court: Suppose you do it within the next 48 hours. [fol. 342] Mr. Eastman: Fine, your Honor. May I offer a brief to you in the meantime, your Honor?

The Court: Yes, if you give copies of it to both the defendant's attorneys and the plaintiff's attorneys.

Mr. Eastman: I would be delighted to do so. May I also have the benefit of their briefs as well?

The Court: I can't do that because I don't know how many are going to intervene, but you may have access to such briefs as have been filed with the Court. You would accommodate me, Mr. Eastman, if you would give me two extra copies because it is my unfortunate custom to mark up briefs with my notations as I read them.

Mr. Eastman: I shall be very glad to do so. Thank you, your Honor.

The Court: I will hear you later, Mr. Eastman, as a friend of the Court.

Mr. Cheyette: Your Honor, my name is Herbert Cheyette of 11 West 60th Street. I should like to move the admission to this court pro hac vice of Mr. Charles Horsky and Mr. Alvin Friedman of the Washington, D. C., bar.

The Court: I would be very happy to have them admitted for the purpose of making any application that they desire to make and for the purpose not of appearing in this suit [fol. 343] as a right but of addressing the Court.

Mr. Horsky: Thank you, your Honor. We have filed a formal motion for leave to intervene on behalf of four publishing firms which I think you have copies of.

The Court: Yes. Let me get your papers. I know I have them here.

Whom do you represent?

Mr. Horsky: Four publishers who are listed in the first paragraph of the document which you have there.

The Court: Do I understand that you represent the Sam Fox Publishing Company, Inc.?

Mr. Horsky: That's right.

The Court: According to your petition they have been a member of the defendant Society since 1924?

Mr. Horsky: Yes, sir.

The Court: And I assume that they are still members.

Mr. Horsky: That's right.

The Court: And you represent Movietone Music Corporation which has been a member of ASCAP since 1932?

Mr. Horsky: Correct.

The Court: And I assume that corporation is also a member yet.

[fol. 344] Mr. Horsky: Yes, sir.

The Court: And third is the Pleasant Music Publishing Corporation which, it is recited, has been a member of ASCAP since 1941. I assume that corporation is still a member of the defendant Society?

Mr. Horsky: Correct.

The Court: And the fourth applicant, Jefferson Music Company, is a member of ASCAP since 1945?

Mr. Horsky: That is correct, and it still is a member.

The Court: Your application to intervene is denied.

Mr. Horsky: May I be heard on that, your Honor?

The Court: I will hear you later on, if you want to, but I have examined the law on the subject. You are members of the defendant Society, and I feel that you have therefore surrendered your right to intervene as individuals. I also feel at this time, this suit having proceeded to final judgment by consent, that it will serve no useful purpose and will not promote the interests of the administration of justice or the accomplishment of the purposes of this suit to permit you to intervene. For those reasons—and, if neces-

sary, I will write a memorandum on it although I would [fol. 345] prefer not to do so—your application to intervene is denied. You may have an exception. You may submit a formal order so that, in the event you feel aggrieved, you may take any appropriate steps that you desire.

However, I will grant to you the same privileges that I have indicated I will grant to Mr. Eastman. I will permit you not to appear in this suit, but I will permit you to address the Court as a friend of the Court so that the Court might have, in determining whether or not the proposed amendment to the consent decree should be entered, the benefit of your observations and your comments. They may be helpful.

You will be heard, if you desire, later on as a friend of the Court. You may have an exception to my ruling denying your right to intervene.

Mr. Horsky: I wonder if you would let me argue my motion to intervene. I think I can persuade you that this is different from most of the cases you have looked up in your researches. If you are persuaded you will not change your mind, then I will not waste your time.

The Court: Mr. Horsky, I am not one who believes, in my functioning here as a judge, that I possess infallibility. I have not been divinely ordained to perform any of my [fol. 346] duties. Perhaps, when I hear you as a friend of the Court, you may then go into this subject as to your possible right to intervene.

Mr. Horsky: All right, your Honor. My associate, Mr. Friedman, I would like to have you note is also appearing with me, Alvin Friedman, both of the District of Columbia.

The Court: All right. I will be very happy to hear you later on as a friend of the Court.

[fol. 347] Mr. O'Donnell: The Government has a memorandum in opposition.

The Court: If you will just let me try to establish a little order here, we may get somewhere, and I will hear you in due time.

Mr. Fishbein: My name is Arthur L. Fishbein of the firm of Fishbein & Okun, 67 West 44th Street. I appear here

on behalf of five publishing members of ASCAP, your Honor.

I submitted a memorandum which was served on your Honor's clerk, I believe last Thursday.

The Court: Yes. I had occasion to look at it, not to study it with care, but I would like to and I hope to before I render my final decision.

Will you state whom you represent so that we may have it on the record.

Mr. Fishbein: Charles K. Harris Music Publishing Company.

The Court: I have your papers. Is Charles K. Harris a member of ASCAP?

Mr. Fishbein: Yes, sir.

The Court: Southern Music Publishing, are they members of ASCAP?

Mr. Fishbein: Yes, sir.

[fol. 348] The Court: LaSalle Music Publishers, successors to Kornheiser & Schuster, are members of ASCAP?

Mr. Fishbein: Yes, sir.

The Court: And RFD Music Publishing are also members of ASCAP?

Mr. Fishbein: Yes, sir.

The Court: And Panther Music Corporation is also a member?

Mr. Fishbein: Yes, sir.

The Court: I understand you make no application to intervene in this suit.

Mr. Fishbein: No, I don't make an application to intervene, but I make an application to be heard.

The Court: I will permit you to appear, Mr. Fishbein, as a friend of the Court, not recognizing that you have any legal status in this matter which entitles you as a matter of right to be heard. I will hear you as a friend of the Court because I seek all the guidance that I can secure.

Mr. Fishbein: Thank you.

The Court: Is there anybody else who desires to be heard?

[fol. 349] Mr. Rothstein: My name is Sidney W. Rothstein, 315 Broadway, New York City. I represent Gem Music Corporation and Denton & Haskins Corporation, two

publishing members of ASCAP; also Barney Young, a writer member of ASCAP. I had advised your Honor by letter dated August 18 of this year of my desire to be heard in this matter. I made no formal application to intervene today because I had previous interventions on behalf of these same clients before your Honor and your Honor had denied them on the grounds that you stated this morning.

I would like, however, to be heard on behalf of these people as a friend of the Court.

The Court: I will permit you to be heard at the proper time that we allot to the friends of the Court.

Mr. Rothstein: Thank you.

The Court: Anybody else?

Mr. Schaeffer: My name is Morton Schaeffer. I am admitted to the Bar of the State of Illinois, and my firm is Schaeffer & Schaeffer. I represent the following music publishers:

Will Rosseter of Chicago;

Lake Publishing Company of Chicago;

[fol. 350] Ray Music Company of Chicago;

Consolidated Music Publishers of New York;

Lewis Publishing Company of New York;

Frederick Music Company of Chicago;

Windy City Music Company of Chicago;

Forrester Music Publishers, Inc., of Chicago;

Clarion Music Company of Chicago;

Lexington Music Company of Chicago;

Mike Aury Music Publishers of Chicago;

Midway Music Company of Chicago;

Haywire Music of Hollywood, California;

Novelty Music Company of Hackensack, New Jersey; and

Orton Music of Chicago.

I make application, your Honor, to be heard.

The Court: You make no application to intervene?

Mr. Schaeffer: No, no application to intervene.

The Court: I will hear you not as a matter of right but as a friend of the Court, the same as I have indicated I would hear the other gentlemen who have made previous

[fol. 351] applications. I will be very happy to have you here.

Mr. Zissu: Your Honor, I am Leonard Zissu of the law firm of Zissu, Marcus, Ebenstein & Stein. I assume my position, pursuant to your Honor's ruling, would be the same as the others?

The Court: I don't preclude you from making any application that you feel advised to make.

Mr. Zissu: Then I will make the formal application to intervene.

The Court: On whose behalf?

Mr. Zissu: On behalf of some 142 ASCAP author members.

The Court: They are all members?

Mr. Zissu: All members of the Society.

The Court: May I suggest that during the day or during tomorrow you file with the Court a statement of just whom you represent.

Mr. Zissu: I have that here now in a short three or four page memorandum, your Honor.

The Court: I will be very glad to have one. Give one to each of the attorneys who appear here for the plaintiff and for the defendant.

[fol. 352] Mr. Zissu: All right. Thank you.

The Court: I take it then that you do not make a formal application to intervene?

Mr. Zissu: I did, your Honor.

The Court: Well, your motion is denied. If you want a formal order entered on it, you may submit it so that you may have a record on which you may act. But I deny your application to intervene for the same reasons I have denied the applications of the others similarly situated. I will, however, hear you as a friend of the Court if you desire to be heard in addition to your memorandum.

Mr. Zissu: Thank you, your Honor.

The Court: Anybody else?

Mr. Niles: My name is Edward Niles of Cadwalader, Wickersham & Taft. We represent Handy Bros. Music Company, Inc., a wholly-owned corporation of the estate of W. C. Handy. I do not ask to intervene. I ask the privilege

of speaking as a friend of the Court, if that seems advisable in the course of the proceedings.

The Court: I will be very happy to hear you, Mr. Niles, later on as a friend of the Court.

Mr. Kaufman: If it please the Court, I appear on be-
[fol. 353] half of several writer members of ASCAP and I merely make an application to be heard at the appropriate time as a friend of the Court.

The Court: Your name, sir?

Mr. Kaufman: Bernard Kaufman, 570 Seventh Avenue, New York City.

The Court: May I suggest that within 48 hours you file a statement as to whom you represent?

Mr. Kaufman: I shall gladly do so.

The Court: And you make no formal application to intervene?

Mr. Kaufman: No formal application to intervene.

The Court: I will be very happy to hear you as a friend of the Court.

Anybody else now?

Counselor, step right up.

Mr. Battle: My name is Edgar Battle. I am a songwriter member and a publisher member of ASCAP. I would like to be heard as a friend of the Court.

The Court: Are you a member of the Bar?

Mr. Battle: No, sir.

The Court: You are not a member of the Bar?

Mr. Battle: No, sir, I am not a lawyer.

[fol. 354] The Court: Maybe you are more fortunately situated. I will be glad to hear you later on. Your first name is what?

Mr. Battle: Edgar.

The Court: All right, Mr. Battle.

Anybody else?

I take it then that nobody else appears and desires to be heard. The procedure of the Court will be this, and if there is any opposition to it I will be glad to hear you as to suggestions as to the procedure:

First I was going to call upon the Attorney General representing the plaintiff United States of America to give him an opportunity to explain the proposed amendments

in brief and to tell us their purpose and to give us some of the background which gives rise to this present proceeding. After we have heard from the Attorney General I will then call upon the attorney for the defendant Society and he would be afforded a similar opportunity to explain his views as to the proposed amendments to the consent judgment which we now have and to explain them in detail and to indicate to the Court why in the opinion of both himself and of his client he feels they are just and proper [fol. 355] amendments designed to accomplish the purposes of the suit.

After that I would hear from Mr. Eastman and Mr. Cheyette and Mr. Fishbein, Mr. Rothstein, Mr. Schaeffer and Mr. Zissu, then Mr. Niles, then Mr. Kaufman, then Mr. Battle. After we have heard from them we will then permit the Government to make a further statement, if they desire, and we will permit the defendant to make a further statement if they desire to do so.

Is there any objection to that procedure?

Is it contemplated that there will be no testimony taken? I understand that the Government desires to offer no testimony?

Mr. O'Donnell: No, your Honor.

The Court: Does the defendant desire to offer any testimony?

Mr. Dean: No, your Honor.

Discussion of Decree

The Court: If we have no offer of testimony, then, we will just proceed to a discussion of the decree. I have set aside the entire day today and the entire day tomorrow to listen to this matter. Within the limits of judicial endurance and of human patience I will try to do so.

[fol. 356] I do wish, however, that as you gentlemen speak and address yourselves to the provisions of this amended decree that you try not to be too repetitious and don't repeat at great length objections made by other parties. However, if you feel that the objection that has been made by somebody else is in line with your thoughts, if you desire to make an observation on that I won't limit you in doing

so. All I ask is that as you speak bear in mind that I am only made of flesh and blood and I can endure only so much, and I would appreciate it if you would try not to be repetitious and come right down to what are the essential points of your statement.

All right. Is there any objection to this procedure that I have outlined?

Does anybody have an objection?

There being no objection voiced, we will proceed then to hear first from the Attorney General.

Take your time, and I suggest that you don't make it a confidential address to the Court alone but let everybody hear what you have to say. Short of making it a political address, you may take that podium over there on the side, [fol. 357] so that you are addressing the Court and the people here. They are entitled to know what you have to say. If you do that, that will be helpful.

STATEMENT BY MR. O'DONNELL

Mr. O'Donnell: Your Honor, before we go into the six substantive sections of the new judgment, I would like to make a suggestion about the seventh section which is the procedural section.

Both ASCAP and the Government would like to withdraw that section. We would like to do that on the understanding that some time after the conclusion of this hearing, if your Honor decides to approve the other six sections of the judgment, we would expect that your Honor would notify us either by opinion or by telephone call or in any way whatever and, that having happened, we would then set in motion the procedures for amending the ASCAP articles.

The Court: Do you want me to take this piecemeal then? What is this seventh section that you want to withdraw by consent? What does it provide?

Mr. O'Donnell: That is the section, your Honor, which has an unfortunate implication in it. It seems to imply that the Court is somehow subject to the vote of the ASCAP [fol. 358] membership, and we are trying to get rid of that implication, which we regret, and we thought the best way

to do it was to just withdraw the entire section, Section VII.

The Court: Now let me see if I understand this further.

Do I understand now that ASCAP comes in today and unequivocally, without reservation, gives its consent to the proposed amendments to the amended decree?

Mr. O'Donnell: No, your Honor.

The Court: Then I think we had better leave it in and I will modify it.

As I understand it, Mr. Dean, what is intended here is this, and if I am wrong please correct me:

You presented a proposed amendment to the consent decree for judicial approval, and while you have consented to it for the purpose of submitting it to the Court you have done so with the reservation that you cannot give your full consent to it until it has been approved by the members of your Society at a regular meeting on notice.

Mr. Dean: Yes, sir.

[fol. 359] The Court: And that you cannot as a matter of mechanics call such a meeting and submit this proposed amended decree to your Society for the purpose of getting their consent and you, in turn, conveying an unqualified and unrestricted and unlimited consent to the Court until you first have some indication that the Court will approve it.

Mr. Dean: That is correct, your Honor.

The Court: I think we had better leave that Section VII in, and I will modify it. My position is that I will not approve a decree which is subsequently subject or subject to subsequent ratification by anybody. That would be a surrender of my judicial prerogatives of which at times I am very jealous.

I will indicate at the conclusion of this hearing whether or not the proposed consent decree will meet with my approval. I will not sign the decree until and unless the defendant ASCAP conveys and files in writing its unqualified, unlimited and unrestricted consent to the decree that I find to be just and proper.

Mr. Dean: That procedure is entirely satisfactory to ASCAP, your Honor.

[fol. 360] The Court: Is that procedure satisfactory to the Government?

Mr. O'Donnell: Yes, your Honor.

The Court: Has anybody any objection to that?

In that respect, then, provision VII will be deemed modified but will not be stricken from our considerations.

Mr. O'Donnell: May it please the Court, the ASCAP complaint was filed in February, 1941 and was followed by a consent judgment in March, 1941.

The antitrust purposes of the suit were twofold: First we wanted to put curbs on ASCAP's licensing practices so that it could not use its control of music, which was very considerable, to injure users of music unreasonably.

Secondly, because we looked on members of ASCAP as competing entrepreneurs, we wanted to insure freedom of competition for these members within the framework of the Society.

The judgment was amended in 1950, and in that judgment there was a considerable amount of relief which was considered useful in preventing the elimination of competi- [fol. 361] tion between members and between members and outsiders.

By 1956 the Department had begun an investigation of ASCAP's compliance with the 1950 judgment. This disclosed, in our opinion, that in order to achieve the purpose of protecting the competitive opportunities of the members it would be necessary to spell out more specifically how the judgment should be carried and in part to secure some supplementary relief implementing the 1950 judgment.

During that period a number of members came in to the Department with complaints and suggestions. Some of these were useful and some were unrealistic in the overall context of the case. However, all were welcome and all suggestions were considered.

We very quickly discovered that when one is dealing with the affairs of 6000 people it is not possible to please everyone no matter what we do.

The Court: May I ask at this point—suppose I get this information from Mr. Dean.

How many members has ASCAP today and in what categories do they fall? For instance, how many composers, [fol. 362] how many authors, how many authors, how many publishers, if you have those figures?

Mr. Dean: We have 6400 authors and composers and approximately 1100 publishers.

The Court: So you have a total membership then of about 7500 divided into two groupings.

Mr. Dean: Let me withdraw that, your Honor. There are 1100 publishers and there are 5300 writers. That makes an aggregate membership of 6400.

The Court: May I ask one more question.

Mr. Dean: Yes, your Honor.

The Court: What is the relationship of that membership, the number of that membership today, to what it was in 1950? Have you any information?

Mr. Dean: May I defer to Mr. Finkelstein on that?

The Court: Mr. Finkelstein, has it remained more or less constant, or has it doubled, or is it a trade secret?

Mr. Finkelstein: I think it was about 2000 in 1950, your Honor. I think about 100 members are taken in each month at the present time.

[fol. 363] The Court: New members?

Mr. Finkelstein: New members, yes.

The Court: All right.

[fol. 364] Mr. O'Donnell: By 1958, your Honor, we had begun negotiating with ASCAP, and these negotiations have now ended in a judgment which we recommend to the Court as being suitable for carrying out the antitrust purposes of the suit.

This judgment consists of six substantive sections which we would like to comment on separately, and on the government side, within the government staff, we have divided up our presentation in such a way that I would like to talk about I, II, and IV and have Mr. Bennett talk about III, V and VI.

As to Section I of the proposed judgment, that takes us back to Section IV(G) of the 1950 judgment which enjoined ASCAP from restricting the right of any member to withdraw from membership on three months' notice. We discovered that, while there was perhaps no intentional restriction on a resignation and, therefore, no wilful contempt on the part of ASCAP, its rules of distribution taken together with its membership contract amounted to a loophole that we had not foreseen in 1950. ASCAP was not

preventing members from resigning, but it was erecting economic obstacles.

Under the present practice, when a member resigns, he continues to share in ASCAP's revenue from licenses in [fol. 365] effect but his share is very much reduced despite the fact that his music is helping to produce ASCAP revenue just as if he were still a member of the Society.

As to revenue from future licenses, and these are possible whenever a co-writer or a publisher remains in ASCAP, he gets no share whatever at the present time, and once again you find that the resigning member's music is helping to produce income for ASCAP though he gets nothing in return. Moreover, he has problems when he leaves ASCAP in licensing his catalog because for the most part he finds that users already have a license from his co-writer who is in ASCAP. But even if he should be lucky enough to find a customer, there is a serious legal question as to whether or not he has a right to license his music after it has already been licensed by a co-writer or a publisher.

The net result is that a resigning member is very likely to find that he has lost the value of his existing catalog.

We tried to deal with this in Section I of the proposed new judgment. That provides that as to revenue from licenses in effect at the time of resignation a resigning member must receive distribution on the same basis as a mem- [fol. 366] ber. As to revenue from future licenses, so long as any co-writer or publisher remains in ASCAP the resigning member may elect to continue to receive distribution on the same basis as a member provided that he agrees not to try to license his work to any other performing rights organization.

We think that, if the new judgment is entered, there will no longer be any economic penalty upon a resignation. It does provide, however, that ASCAP, if it treats all members alike, all resigning members, may deny a resigning member the option to receive distribution on any basis other than current performance. We had no objection to that because it seemed to us that it would not make sense to force ASCAP to pay a resigning member on any other basis because the other basis would include seniority and that is a

factor which the resigning member obviously intended to abandon when he resigned.

The Court: Perhaps at this point it might be well to ask if any of the nine attorneys who have appeared here find any objection, including Mr. Battle, to this provision. Apparently, then, that is one thing that everyone agrees on.

All right, Mr. Dean, you need not comment on that. Ap-
[fol. 367] parently there is no objection to that. So, unless you feel it necessary when it is your occasion to speak, you don't have to talk about it. Nobody else is objecting to it.

Mr. Dean: No, sir. When this matter was called to our attention we wanted to try to be as fair and equitable to the resigning member as we could, and we worked out this provision with the Department of Justice, and it seems to us to be a fair and equitable provision.

The Court: Apparently you have accomplished what might perhaps have seemed impossible. Everybody is satisfied. All right. That is all right. There is no objection to that part. That is out the window.

Mr. O'Donnell: Now we come to Section II.

The Court: I want, by these observations, to focus my attention upon the real problem that is before me. All right. If any of you object to this procedure, speak up.

Mr. O'Donnell: Section II of the new judgment is an implementation of Section XI of the 1950 judgment. That required ASCAP to make distribution on a basis which gave primary consideration to performances indicated by objective surveys. There was actually only one adjective [fol. 368] in that 1950 judgment which specifically told ASCAP what kind of survey it must conduct, and that is the word "Objective." I mention that so that your Honor will see what a difficult problem it would have been for the government if we had tried to think in terms of a contempt proceeding against ASCAP in connection with perhaps not carrying out the counterpart of the present Section II.

I should also say that during all this period since 1950 ASCAP has provided the government with copies of all of its rules and regulations and its changes of its rules and regulations which would also, of course, have made it pretty hard to proceed via the contempt route.

Though I say that there is only one adjective in that 1950 judgment, the word "objective," I think that a fair interpretation of the whole paragraph is a necessary implication that the surveys ought also to be adequate and fair. Our investigation disclosed that ASCAP's survey has been inadequate in a number of respects.

The principal deficiencies of the old survey were these: The old survey over-emphasized network performances in that it received logs of each network and multiplied these by the number of stations in each network. It then took a very meager sample of local performances by tape. In [fol. 369] radio it used a multiplier of 20, and in television it used a multiplier of 60. These local multipliers we believe were inappropriate.

The result was that ASCAP was distributing one-third of its revenue on the basis of local performances and two-thirds on the basis of network performances.

The Court: If you don't mind my interrupting—

Mr. O'Donnell: Not at all.

The Court: —this proposal, then, affects only the manner in which the collections of ASCAP are to be distributed amongst its membership; is that correct?

Mr. O'Donnell: No, no. I am talking right now about Section II which affects only the attempts which ASCAP makes to determine how many times the songs of each of its members are played.

The Court: But the purpose of this survey is to give to ASCAP a formula—

Mr. O'Donnell: Yes. It will later be used for that purpose.

The Court: And it is to be the basis of a formula which doesn't affect the fees to be paid by others to ASCAP but simply determines in a measure the manner in which or the proportion in which ASCAP's collections are distributed. [fol. 370] Mr. O'Donnell: That's right. If you are going to pay the members, of course—

The Court: How much you are going to pay them.

Mr. O'Donnell: —you first have to determine how many times their music has been played.

The Court: All right. Now let me ask you this question: What power does this Court have to intervene in those

matters as to how this money should be distributed amongst ASCAP, and where does this Court have the authority to intervene?

Mr. O'Donnell: The first answer—I don't suppose it is an entire answer—is that this Court has already gotten into that area in the 1950 judgment. The second answer is that the history of ASCAP shows that it rather obviously needs regulation, and if this Court doesn't do it there is no other authority that will.

The Court: So I understand then it is the contention of the government that the scope of this decree is to regulate not only the affairs of ASCAP in what I would call the consuming public but to regulate the affairs of ASCAP as an entity amongst its various members.

Mr. O'Donnell: Yes, it is, your Honor. I think in a sense the Court is filling a vacuum here which no one else would [fol. 371] fill if the equity court does not do it. ASCAP is a very peculiar entity. It is a little bit like a public utility. It is a little bit like a labor union. It is a little bit like a cooperative. All of these other entities have federal regulation.

The Court: And you have charged that it is a little bit like a conspiracy.

(Laughter.)

Mr. O'Donnell: Yes. But I say that all these other entities are regulated by someone.

The Court: All right.

Mr. O'Donnell: And if the Court won't do it there is no one who will. I suppose it would be politically unrealistic to assume that the government would ever set up a commission to regulate ASCAP. I think it is terribly regrettable that the Court has become enmeshed in all this work for 20 years, but I suppose it also should be said to the credit of the Court that it has accomplished something. The Court has protected to some extent the rights of a lot of writers and publishers of music.

The Court: All right.

Mr. O'Donnell: I was saying that the result of the overemphasis on network performances was that ASCAP was [fol. 372] distributing one-third of its revenue on the basis

of local performances, two-thirds on the basis of network performances which, strangely enough, reflected its receipts from these media almost exactly in reverse.

It seemed to us that the performances on each media should be weighted in some approximate proportion to the revenue that is received from each media. Our rationale there was that the value of a song is best measured by what the users are willing to pay for it. We also thought that the local sample that was being taken by ASCAP was too small and we were troubled because other media such as restaurants, nightclubs and so on were not surveyed at all although they produce about 11 per cent of ASCAP's revenue.

That brings us to Section II(A) of the proposed new judgment which requires ASCAP to conduct either a census or a scientific sample of performances. This is what the government is most proud of in this section. The new judgment substitutes a scientific survey for a non-scientific survey.

There has grown up in recent years the new science of sampling which consists of a series of techniques that are designed to collect information within very small margins [fol. 373] of error.

The Court: You don't refer to that Gallop poll, do you, that we had some years ago?

Mr. O'Donnell: Yes, I do, in part.

The Court: Wasn't there something in one of these Literary Digests that predicted the defeat of somebody?

Mr. O'Donnell: The Literary Digest fiasco occurred back in 1930.

The Court: Oh, since then it has improved?

Mr. O'Donnell: That's right.

The Court: All right.

Mr. O'Donnell: The Gallop poll in 1948 of course misjudged the Truman election.

The Court: Yes, yes.

Mr. O'Donnell: But that does not happen any more.

The Court: Oh, no. All right.

Mr. O'Donnell: It could not happen again, I am told, your Honor.

The Court: You would be surprised. Of course you can't produce a Truman again, you know. After they produce a man like him they throw away the mold. Well, we will forget that. That is my own personal opinion. Perhaps I [fol. 374] shouldn't use this place to say these things. All right. Go ahead.

Mr. O'Donnell: I assert to the Court that this is a science.

The Court: All right. You now propose to set up a system whereby there will be a real study made by men who have specialized in the field?

Mr. O'Donnell: Yes, your Honor.

The Court: And that will be the basis for future distributions?

Mr. O'Donnell: Exactly.

The Court: Who is going to make this survey, and what is the plan you are now proposing?

Mr. O'Donnell: In the first place, no mere lawyer would claim the ability to design the procedures that were necessary to accomplish this.

The Court: You would be surprised. I never have seen such modesty attributed to the bar yet.

Mr. O'Donnell: I must say that at least the ASCAP lawyers and the government lawyers did not claim that ability, so we both consulted experts.

The Court: All right. I think that was good planning.

[fol. 375] The Court: (sic) The new plan in general is this:

ASCAP is going to continue to receive logs from all television networks and from CBS and NBC radio networks, that is, logs of all commercial programs but not sustaining programs.

I should call your attention to the fact that ABC radio network is being dropped. ASCAP is not going to take logs from that network on the advice of its economic consultant. It is almost a misnomer to call it a network from our standpoint because, except for some religious music on Sunday, I understand that it has only one musical program, and that is "Breakfast Club." I am told that it pays ASCAP a very small amount of revenue, in fact much less than ASCAP receives from many local stations. So the economic consultant concluded—

The Court: Who is the economic consultant?

Mr. O'Donnell: Joel Dean Associates.

The Court: Are they recognized in the field?

Mr. O'Donnell: Yes, they are.

The Court: Joel Dean.

[fol. 376] Mr. O'Donnell: These people concluded that the cost of logging ABC was out of proportion to the revenue that was being obtained from it.

I also call your attention to the fact that ASCAP is not going to log sustaining programs on radio. That is not a television problem because we understand that on television there are no sustaining programs; practically everything is commercial.

A sustaining program is essentially a service that a network offers to its affiliated stations. They are free to use it constantly or infrequently or not at all. I suppose it comes down to the fact that they use it when they have nothing else to use.

The Court: To sort of fill in. They use it when the time has not been sold; can't collect for it.

Mr. O'Donnell: That's right, and the network doesn't keep any record of how much or how little the different stations use it. It is not an income producing program for the network as are commercially sponsored programs.

Since it has not been possible to learn how often stations [fol. 377] have used a particular sustaining program, ASCAP in the past has been in the unhappy position of having to make fairly arbitrary guesses. For a time it has shown that 44 stations were using each sustaining program so that it multiplied by 44. Then it changed and it reduced its assumption to three. I believe that 44 was too high and three was probably too low. But it seems to us to make more sense to put the sustaining programs under the local survey where they should be picked up in approximate proportion to their actual use. Theoretically this should produce performance records very close to those of actual logs, if actual logs were obtainable, plus the information as to how many stations were using each program.

This is especially so because ASCAP is going to secure the music program list from the main office of the network on every sustaining program in addition to the local survey

work, so there shouldn't be any non-identification problem at all in connection with the local survey of sustaining programs.

Secondly, ASCAP's local survey is going to be increased by approximately 50 per cent, and better geographical [fol. 378] distribution is going to be maintained.

The Court: These are as a result of the recommendations of Dean Associates?

Mr. O'Donnell: The recommendation of Dean Associates.

The Court: And of the Attorney General.

Mr. O'Donnell: As modified by the recommendations of our expert.

The Court: All right.

Mr. O'Donnell: Thirdly, ASCAP will attempt for the first time to survey night clubs and dance halls and wired music as an experiment to see if it is worth while to do this.

Fourthly, the local samples will have to be randomly selected and appropriate blowup multipliers will have to be used so that each sample will be weighted in relation to the unsampled performances in the particular licensee's group from which it is taken. That is to say, if the sample was 1/100 of all time on a particular station or a group of stations, the proper blowup multiplier would be 100.

Next, ASCAP must also use economic multipliers which [fol. 379] are supposed to reflect the revenues from various groups of licensees.

Lastly, ASCAP is required to try to get logs of local stations in order to reduce identification problems, particularly from foreign language stations, good music stations and background music stations. That means Muzak and others in that field. And I understand that as to Muzak and the others in that field ASCAP is by contract arranging to get logs.

The Court: I think that was part of the royalty fee that I fixed, wasn't that, Mr. Finkelstein, that they were to give you logs?

Mr. Finkelstein: Yes, your Honor, right in that contract.

The Court: All right.

Mr. O'Donnell: Of course these logs will not only be

useful in reducing non-identification problems but they will also help to check the accuracy of the tape service.

After various consultations the Government was told by expert personnel at the Bureau of the Census that this proposed judgment correctly directs the kind of survey that should be made and that the new ASCAP survey [fol. 380] plan appears to be in accordance with accepted principles of this new science. However, they insist on the reservation that the performance of a complicated survey cannot be guaranteed in advance and must be observed after it has gone into operation to insure that its data is being properly processed. This surprised us as much as it probably surprises the Court.

The Court: No, it does not surprise me. I don't regard it as a science. It is subject to human error and trial and error, and that is the way you correct it. You try something out and you modify it when you see it does not work. It is not exact. Therefore it is not a science.

Mr. O'Donnell: No, we don't intend that it is exact. We intend that it be very close.

The Court: I have studied this part very carefully and it impresses me as being a sensible idea at least to try out and see how it works.

What about this review business where you say that a survey is to be reviewed periodically or periodically reviewed by an independent expert to be appointed by the [fol. 381] Court? What did you have in mind in that connection?

Mr. O'Donnell: That, too, is a result of advice we received from the census experts.

The Court: What did you mean when you said: An independent expert to be appointed by the Court? Did you have in mind that the Court should appoint another expert in this field to have him check up on the work of the expert who has been employed, one expert checking up on another expert? Or did you have in mind that the Court should appoint some practical, fairminded business man with a little business acumen and common sense to see how this thing works out?

Mr. O'Donnell: No, I don't think that would work. I think the man who has to be appointed must have a very superior mathematical education.

The Court: I can't see appointing an expert to check the work of another expert. That is something that I cannot grasp. I would rather see some competent business men, perhaps two business men, men with business judgment—not necessarily business men, but perhaps one with some legal training and one without legal training—sit down and look over this thing every couple of months to [fol. 382] see what they think about it rather than have another expert in the same field.

Mr. O'Donnell: I suggest that the mere business men would not be able to make the very complicated computations mathematically that are necessary to see whether this survey is coming in accurately or not.

The Court: Well, he would have a pretty fair sense of business judgment. Then, if he needed any mathematical calculations, he could have them made the same as a business man calls in an accountant at the end of a month if he feels business isn't going right: Give me a profit and loss statement. How many have we sold of this item, and how much did it cost us to produce. Business sense, maybe, and a little judgment. I can't grasp appointing an expert to approve or pass upon the work of another expert.

Mr. O'Donnell: The first expert has merely designed the survey. He is not going to remain as a continuing supervisor of the survey. The survey is going to be carried out very largely by ASCAP personnel, and it is that, I suppose, which provides the needs for an independent [fol. 383] expert to check on what is going on. I think that happens throughout the whole business world. When a business man wants something done which is at all scientific he just calls in an expert.

It seems to me very much like—

The Court: But we have already called in one expert. Now we are going to call in another expert?

Mr. O'Donnell: You have called in one expert who has devised a plan, but he is not going to remain there continually supervising the outcome of his plan.

The Court: Then how do we know this plan has been carried out?

Mr. O'Donnell: That is why we need the new expert, to see that it will be carried out.

The Court: No, I contemplate that ASCAP not only would have this man of Joel Dean Associates set up this scheme or survey system but that they would bring him in every month or so and let him see how it is working.

It is like going to consult a specialist as to your ailment. He tells you: Here, now, take these pills and come back [fol. 384] and see me in two or three weeks.

Mr. O'Donnell: Yes, sir, I think your Honor has hit upon a perfect example.

The Court: I think this Dean Associates should be on some kind of a regular retainer to keep watch to see that the treatment they prescribed is being carried out. Then I think that this contemplated that the Court would appoint one or two men to sit down and look this thing over maybe quarterly; and, very frankly, as I read this over the weekend, I became more convinced that that course should be followed and I determined in my own mind who might be appropriate, and I have in mind, very frankly, men of practical business judgment like former Senator Ives, and a man with some legal training like former Supreme Court Judge McGeehan.

I don't know whether they will take the job if I offered it to them or if the opportunity comes for me to consult with them, but I think men of that type who have public confidence in them, who have been found to be honest, decent men of good business judgment and legal training, who have reached the stage where they are above any [fol. 385] possible political contacts, would be the type of men that I would have in mind.

However, we will come to that later on. I have not mentioned this to either one of these men. I don't know whether they would even undertake the work. But that is what I would have in mind.

Mr. O'Donnell: Of course we were told by the people of the Bureau of the Census that a sampling design expert was necessary.

The Court: They can get somebody to look at this and then pass their own judgment on it. These men are men of business judgment, men who have been accustomed to pass on these or similar things of this nature in their long careers, men who have fulfilled years of public service and who have public confidence in them which they have earned

by the way they carried out their work, and I for years have had great respect and admiration for the judgment of both of these men.

As I say, I don't know if they would even take this position if I called them up. They might tell me "Thanks" and then "No." But men of that type are men that I have in mind.

Mr. O'Donnell: I think we approached it much like a [fol. 386] patient goes to his doctor. If the doctor says take six black tablets every day—

The Court: All right. Let me see.

Is anybody objecting to this survey part of the decree?

Mr. Horsky: Yes, sir. I would have considerable to say about that.

The Court: Mr. Horsky is objecting to that.

Mr. Schaeffer: Mr. Schaeffer objects to that.

Mr. Rothstein: So does Mr. Rothstein.

The Court: Anybody else?

Mr. Battle: I object to that.

Mr. Fishbein: I object to that although my brief is limited to Section IV.

Mr. Zissu: I object to the survey, but I have not included that in the brief except collaterally.

The Court: Mr. Battle, you are objecting, too?

Mr. Battle: Yes, sir.

Mr. Barney Young: Barney Young also.

The Court: Barney seems to be an added starter.

[fol. 387] Are you Mr. Young?

Mr. Young: Yes, your Honor. I am represented by Mr. Rothstein.

The Court: Then you let Mr. Rothstein speak for you. You have a very able lawyer.

Mr. Young: I want to speak for myself personally so far as I am concerned as a songwriter. He is representing two firms with which I am connected.

The Court: You didn't make an application to be heard before, and Mr. Rothstein said that he represented some clients. I think he mentioned you as one of them, and I suggest that you let Mr. Rothstein speak in your behalf.

Mr. Young: I think there was a misunderstanding so far as—

[fol. 388] The Court: Supposing you straightened it out with your counsel. All I can assure you of is that in the past Mr. Rothstein has given very substantial evidence as to his ability, his industry, and I regard him as a very capable lawyer in this field of law.

Mr. Young: I believe he is very capable. That is why I have retained him. But, your Honor, does that preclude me from later speaking?

The Court: Yes, it does. I am not going to hear a client and his lawyer, both.

You didn't speak or ask to be heard before, did you, sir?

Mr. Davis: Bob Davis.

The Court: What is your interest in this thing?

Mr. Davis: I happen to be a member of the Society, sir, and when he mentioned a survey I feel that there is some slight discrepancy that—

The Court: You speak to Mr. Battle or let him speak in your behalf. He is a songwriter, too, and he will voice your objections on your behalf, too, later on. All right?

Mr. Davis: I don't think he can understand what is in my mind. But, if you say so—

The Court: I am sure you can tell him what is in your [fol. 389] mind.

Mr. Kaufman: I would like to be heard on that, too.

The Court: All right, Mr. Kaufman.

Mr. O'Donnell: May I pass now to Section IV which is the fairly controversial section?

The Court: Section IV has to do with distribution to publishers?

Mr. O'Donnell: Weighted voting.

The Court: All right.

Mr. O'Donnell: The 1950 judgment required that the board of directors be elected bi-annually by vote of all members but that due weight might be given to a member's classification in determining how many votes he might cast. It also required that the board give representation as far as practicable to members with different participations in ASCAP's revenue.

I call your attention to the fact that that was fairly loose language because "as far as practicable" might mean some or much or maybe none at all.

ASCAP tried to carry this into effect by requiring the nominating committees to propose candidates for the board with different participations. Moreover, the nominating committees themselves were generally comprised of rather [fol. 390] small members. The rub was that, though frequently nominated, these candidates with small participations were very seldom elected. That is because the members of the old board automatically stand for reelection, and except for three instances since 1950 they have always won.

We believe that the present allocation of voting strength concentrates far too much power in the top writers and publishers. At the present time 99 per cent of the publisher members taken together do not have enough combined strength to elect a single director. The same could be said of 95 per cent of the writer members.

In these circumstances the casting of a vote by a small member is a fairly hollow gesture, and this is all the more serious because the board of directors controls the whole ASCAP operation.

We have never questioned the principle that a great writer like Irving Berlin deserves much more of a voice in the Society than an unknown writer who has perhaps written only a single piece of music. That principle was expressly acknowledged both in the 1941 judgment and in the 1950 judgment.

What we do say, however, is that the present ASCAP [fol. 391] rules go too far in recognizing top writers and top publishers. We think they obviously deserve a lot of recognition but not as much as they have been getting.

The present system is one writer vote for each $20 of income and one publisher vote for each $500 of income.

The new plan contemplates weighting votes on the basis of current performance credits during the latest fiscal year. We think of that as a fairer basis because income includes seniority and past performance factors, and voting rights that are tied to income obviously favor the older members.

The new judgment also sets a ceiling of 100 votes beyond which no member can climb. The significance of that ceiling can be put into perspective if we recall that in the 1957 election the member with the greatest number of votes had

5,117 votes. The new judgment also uses a graduated scale of the performance credits that are needed for each additional vote in order to make it harder for the larger members to accumulate voting rights up to 100.

If we look at the 12 publishers and their affiliates [fol. 392] who are now on the board of directors they show today a combined voting strength of 56 per cent, and if the new judgment is signed they will be reduced to 30 per cent.

There is also a provision allowing any group of writers or publishers representing 1/12 of the total vote to band together 90 days in advance of an election and elect a director by petition if they desire to do so. 1/12 of the publishers total would be 409. There are 628 publishers who have only one vote each. That means that about two-thirds of them, if they wanted to, could get together and elect a director who would presumably be specially sensitive to the interests of one vote members.

The Court: Sort of proportional representation?

Mr. O'Donnell: Yes.

The Court: In your new plan do you provide for cumulative voting?

Mr. O'Donnell: No, your Honor. If you cast a vote by petition, you are then ineligible to cast a vote—

The Court: Apparently you do not get my point.

[fol. 393] Mr. O'Donnell: There is no cumulative voting involved here. Each member votes for all directors. He is not allowed to combine them.

The Court: So there is no cumulative voting.

Mr. O'Donnell: No, your Honor. The new judgment takes especial precaution with respect to the top ten publishers and their affiliates. This group now controls 63 per cent of the publishing vote, and if the new judgment is signed they will be cut back to 37 per cent.

The judgment goes further and in effect provides that, if these top men should grow any further in the future, the formula will have to be revised to hold their voting strength within 10 per cent of the strength at which they start off on the day the judgment is entered. So there are no conceivable future circumstances under which these top ten publishers could possibly grow to more than 41 per

cent control of the Society. They will begin at 37 per cent control.

I think it is interesting to note that these ten publishers actually have two-thirds of the performances of the Society [fol. 394] and we are going only to give them 37 per cent or one-third of the votes. That means inversely that all the rest of the publishers have only one-third of the performances but they are going to get two-thirds of the votes.

There is another provision for (D) which permits any group of 25 writers or publishers to place candidates in nomination for directorships. This is a happy contrast, we think, from the present system under which the directors automatically stand for reelection and also elect the committees which nominate others to run against them.

I would suppose that all the friends of the Court who are here today would agree that this new judgment has taken very substantial strides in the direction of diminishing concentration of control. Some of them of course may ask:

Why didn't we go further, or why didn't we demand one vote for each member?

The first answer is that all these concessions which are in the judgment were very hard won at the negotiation table, and we were convinced that we have reached the absolutely outermost limits to which ASCAP could be persuaded to retreat by negotiation. Moreover, as our nego-[fol. 395] tiations went on we gradually came to believe that it wouldn't be appropriate or fair to go any further.

We think that there is very much substance to ASCAP's argument that those who over the years have done the most for ASCAP are entitled to be recognized as its elder statesman. This is not a society in which every member pays large fees, large dues. Actually the only real dues are however much or little each member adds to the catalog of the Society.

When ASCAP goes around selling its catalog, most music users are attracted primarily because it contains the works of Hammerstein and Berlin and Kern and Gershwin and its other great writers, and they have a very much lesser interest in the circumstances that it also contains a large number of more or less unknown pieces of music by more or less unknown writers.

If the Court were to give every member an equal vote we think that would deliver the control of ASCAP into the hands of hundreds or thousands of very small members, many of whom I have heard characterized as amateur songwriters.

The Court: Sometimes an amateur turns out something [fol. 396] that hits the bull's eye, though.

Mr. O'Donnell: Yes, that happens, and I certainly don't mean to deride them. I mean that they are amateurs only in the sense that they perhaps have had only one or two songs published and they may be practicing architecture or dentistry or something else as their main livelihood.

But if we did that we would have another set of statistics which would be just as disturbing as those that disturb us today. They would show then that ASCAP was being dominated by members who had perhaps 2 per cent of all the performances of the Society.

Which is worse? Shall we have ASCAP run by a numerical majority with only a tiny fraction of the performances, or shall we have it run by a numerical minority who has a vast majority of the performances?

Of course there wouldn't be any problem at all if every publisher and every member had the same number of songs and if all songs were of equal quality. But we cannot make that come to pass. So we have to strike a balance which is [fol. 397] what we think the new judgment does.

It has also been represented to us that many or most of the top writers and publishers would walk out of ASCAP if we should succeed in inducing this Court, after litigation, to cut any further into their influence. We could insist, of course, that there must be numerical equality of voting rights even though the heavens fall. But we fear that the heavens would fall, and if that happened the rest of the members of ASCAP, who I think include most of the friends of the Court who are here today, would find that their incomes would be very precipitously reduced.

The catalog of ASCAP minus the music of its name writers could not be sold for anything like the revenues which it is bringing in now. I would think that if that happened, if a large number of the top members did walk out of ASCAP, the survival of the Society itself would be in doubt.

So we ultimately came to the conclusion that a prayer for equalizing of voting rights would be equivalent of a prayer for dissolution.

One final point. It has ever been said that there is more [fol. 398] than one way of skinning a cat. If the new judgment goes into effect all these charges about a board of directors which is bent on ruining small members are going to fade in importance. The new judgment circumscribes very sharply what the board may do in the area of surveys, distributions and grievance procedures with the result that its power to do the kind of harm that offends the antitrust laws is going to be very much curtailed if not eliminated.

The Court: I have a note here on this section:

Would it provide for the election of directors within one year or after the effective date of the proposed final judgment?

Mr. O'Donnell: Yes, it would.

The Court: You say probably early in 1961?

Mr. O'Donnell: Yes.

The Court: Why couldn't it be earlier than that? Why couldn't it be in 1960?

Mr. O'Donnell: This judgment is timed, it appears, just after an election. There has just been an election.

The Court: If they are going to vote on this, they might [fol. 399] as well vote on a change that would be effective not a year and half from now but make the change effective some six months from now.

Mr. O'Donnell: I was going to make the point first—

The Court: You see, if you say early 1961, that is another year. Early 1961 may be April. That is another 18 months. Why not have this election and let these new voices be heard within, say, six months? Wouldn't that tend to promote harmony?

Mr. O'Donnell: I have only two thoughts on that, your Honor. First, this judgment is untimely in the sense that it comes into being, if it comes into being, almost immediately after an election.

The Court: That means nothing.

Mr. O'Donnell: My second provision is this one about election by petition 90 days in advance of the election. I

suppose, if anyone is going to take advantage of that, they will have to be some kind of campaign manager.

The Court: Suppose we ask Mr. Dean to comment on whether or not this election could be held at an earlier date; [fol. 400] when your time comes, Mr. Dean, if you will just make a note of that to speak on that subject.

Mr. Dean: I will be glad to do so, your Honor.

The Court: I would like to hear you on that. My idea is that it seems a little long to keep this thing waiting until the early part of 1961. Maybe you could put this into effect in the summer or in September of 1961, at the latest.

Suppose now we take a ten-minute recess.

(Recess taken.)

Mr. O'Donnell: I would just like to finish the thought which I thought I had begun:

That if any sort of a self-appointed campaign manager is going to run around trying to line up 1/12 of the votes in order to elect a director by petition, I suppose it is going to take him two or three months to do that. Then he has to get them lined up.

The Court: I have seen campaigns run in a much shorter time.

Mr. O'Donnell: Let's say it takes two weeks to do it, then.

[fol. 401] The Court: I just throw that out as a suggestion. As I read this over the weekend I thought it was postponing the election under the new decree, assuming that I approve it, for too long a time. I would like to see it get into operation as quickly as feasible to do so.

Mr. O'Donnell: My point simply is that the petition—

The Court: I don't say that by way of criticism. I think that you tried to work out something on this provision, that you have given it your best efforts, I know that, as you have to all of these provisions, but sometimes a new mind on these things might lead to a change of view on your part, and it seemed to me that as soon as you can get this decree into operation, assuming I sign it, the better it will be.

Mr. O'Donnell: That is possible.

The Court: Mr. Dean is going to comment on that, I hope, and we will see what he has to say. He may agree with me; I don't know.

Mr. O'Donnell: At least we couldn't have an election for 90 days plus whatever time it takes to line up 1/12 of the voters.

[fol. 402] The Court: 90 days more, six months.

Mr. O'Donnell: That is about all I have to say, your Honor.

The Court: Your associate is going to speak about what portions?

Mr. O'Donnell: I would ask you to listen to Mr. Bennett on Sections III, V and VI.

The Court: That concerns the distribution of the moneys.

Mr. O'Donnell: III is distribution.

The Court: And I suppose that is what everybody is interested in. III is distribution. V is what, just to refresh my recollection?

STATEMENT BY MR. BENNETT

Mr. Bennett: V, your Honor, has to do with the method of taking appeals.

The Court: All right.

Mr. Bennett: And VI has to do with insuring that the right to admit new members is properly carried out.

The Court: All right. Suppose you stand over there, Mr. Bennett, and take your time now and speak so that everybody can hear what you have to say.

Mr. Bennett: Yes, your Honor.

[fol. 403] The Court: Very frankly, I want to turn this into what is known up in the Northeast here as a sort of a town meeting with me being the town boss. I would like to hear all your views, and I want you to participate in this because I think that by doing that we can create a better understanding and we can get a spirit of cooperation which is most desirable if it can possibly be achieved.

Mr. Bennett: If your Honor please, may I turn first to the question of the distribution of funds which are collected as license fees by the Association. You have heard Mr. O'Donnell in connection with the surveys, how they determine what performances there are. Now we are turning to how those funds which are collected are distributed among the members of ASCAP.

This has naturally been a very sensitive point as it affects the cash returns to the members, and since the entry of the original decree in 1941 it has been a source of dissension.

At the outset, if I may, I would like to draw to your attention a few other reasons for the inclusion of provisions which affect what on the surface appear to be the purely [fol. 404] internal affairs of this Association. The reason flows in the first instance from the ancient principles of equity which had moved the Chancelor, once he takes jurisdiction of the matter, to see that complete justice is done to all the parties.

The Department in this proceeding which commenced in 1941 sought relief from what were regarded as monopolistic practices of this Association which at that time controlled a great mass of the copyrighted musical property in the United States, and in regulating the Association the defendant felt that it must, and it recommended to the Court with the consent of the Association, not only regulate the Association's activities with respect to those whom the Association was licensing but also insure that the distribution of the funds which were collected under those licenses be fair and equitable, and the Department also felt that both of these ends were appropriate to prevent a restraint of competition.

The regulation of the Association's activities with outsiders of course is clear. The Court, once having taken jurisdiction, we felt it would be appropriately advised to [fol. 405] see to it that the distribution of the funds to the persons who were joined in this Association should be used in a manner not to subsidize one writer and to starve another. For although these men, particularly the writers, are great artists, they also compete with one another for the funds which they require physically to support their endeavors.

May I continue now with the history. The first decree of 1941 in paragraph X laid down very general rules for the Association prescribing the method to be followed by the governing board in making distribution. It required the by-laws of the Association to prevent distribution except in a fair and non-discriminatory manner and on the basis of,

first, the number, nature, character and prestige of the compositions, secondly the length of time the compositions had been available to the Society, and third the popularity and vogue of these songs.

These criteria granted to the Association considerable latitude both in classifying the writers and the songs. Thus an opportunity for favoritism existed.

[fol. 406] After ten years of experience the Court, again with the consent of ASCAP, sought to prescribe a more objective test at the request of the Government. This time Section XI, to which Mr. O'Donnell has already referred, provided that in general the performance of the work should be the guiding principle in making distribution. The phrase used was "primary consideration," and I need not belabor the point that when you have a word like "primary" it is difficult to find a contempt.

Experience since 1951 has demonstrated that again the provisions of the decree as amended in 1950 were too general in the matter of distribution. Hence in this decree we sought greater particularization, and after protracted negotiation this proposed judgment was obtained.

Very generally so far as distribution is concerned the Department presents the proposed decree as a compromise, a compromise which we believe will permit distribution on a much more objective basis than was the case before.

We do not contend that it accomplishes perfection, but we submit that it is the best result that could be ac-[fol. 407] complished without very lengthy and very difficult litigation with very uncertain results.

As such we submit this proposed judgment to the Court as a practical solution to a distribution problem which includes many factors which cannot be measured with tools other than the judgment of the persons who are experienced in the musical field.

The Department has canvassed this field and where possible has incorporated the judgment in the various formulas which are present in the proposed decree. In most instances this has reduced the judgment factor in the mechanics of distribution to a degree which first seemed impossible.

The Court: Let me ask you a question, if you do not mind an interruption.

Mr. Bennett: Yes, sir. I would like you to, if you would, your Honor.

The Court: At the present time I understand that all of the royalties and all the revenue of the Society is put in one general fund and then what remains after the operation expenses is divided and 50 per cent of that goes to the writer [fol. 408] members—

Mr. Bennett: Yes, your Honor.

The Court: And 50 per cent goes to the publisher members.

Mr. Bennett: That is correct.

The Court: Is it contemplated by the proposed amended consent decree to change that basic provision.

Mr. Bennett: No, sir, it is not.

The Court: It will still be 50 per cent of the publishers and 50 per cent to the writers?

Mr. Bennett: That is as I understand it.

The Court: Now then, your changes affect the manner in which that 50 per cent shall be divided amongst the publishers and the manner and method in which it shall be divided among the writers.

Mr. Bennett: Yes, sir, your Honor, precisely.

The Court: All right.

Mr. Bennett: I thought I might draw to your attention—

The Court: May I just ask those who have asked to appear here, does anybody object to this basic division of 50 per cent to the writers and 50 per cent to the publishers? [fol. 409] Apparently then that is accepted as a fair basic division. All right.

Mr. Bennett: Now, your Honor, may I turn to tell you just how this reduction of the judgment factor which I talked about was reduced to a formula. I first would like to draw your attention, and I am sure your Honor remembers it, to the fact that the provisions setting forth this distribution plan are found in four separate places in the document to which was handed to your Honor and which was circulated to all the members.

The Court: Incidentally, I don't have the document divided in the very nice manner in which yours is.

Mr. Bennett: Your Honor, may I give you mine.

The Court: I don't want to take it from you, but it would be very helpful if I had one like the one you have. This is very nice. This has all the divisions in it and it will be most convenient. Not only do I have it now, but any of you gentlemen who want to look at it during the recess might look at it.

[fol. 410] All right. You don't mind my taking these from you?

Mr. Bennett: Not a bit, sir.

Section III in the body of the decree, which is the last of the ones with blue divisions there, your Honor, has a tab that says "Distribution" on it, I believe.

The Court: You assume now that I can navigate my way through this book.

Mr. Bennett: I will assume that you can, sir.

The Court: All right. I have come to it.

Mr. Bennett: The general terms are in Section III, and attachments (A) and (B) supply the rules respectively for the writers and the publishers.

Attachment (B) relating to the writers also refers to a writer's distribution formula which is not part of the decree but which is a proposal which ASCAP has made of the manner in which they believe the distribution will take place and which the Government has indicated they believe will be in accordance with the provisions of the judgment.

Then there is a third attachment which is part of the [fol. 411] judgment which is called the weighting rules. That is attachment (C), and that supplies the rules for weighting the significance of particular uses for musical compositions and determining their relative values.

Finally, just as there has been a writer's distribution formula, there has been a weighting formula. This is not part of the decree; it is the proposal by ASCAP, which the Government thinks is in accordance with the decree, of how the weighting rule shall be applied. The weighting formula indicates in considerable detail how it is to be applied.

I would like to draw your attention first to the concept of the distribution plan. That is the main concept that, unless other factors require some different approach in the interest of fairness, performance of the musical work will be the basis for the distribution of the funds both to

the writers and to the publishers, considered separately as your Honor has indicated.

We believe we have developed something which is very advantageous in this particular decree to insure that the principle of performance would be the dominant criterion. [fol. 412] Individuals, both publishers and writers, with two classes of exceptions are given the right to elect to receive distribution on the basis of performance. Thus anyone who is dissatisfied with the more complicated plan which is proposed by the Association could elect to receive distribution on the current performance basis.

The first exception—I have mentioned two—is the 100 top writers whose works have been so overwhelmingly popular that the Association felt, subject to the collective approval of those writers, they should be treated differently. This collective approval can be reviewed on request of the Government or on a request of a group of writers after it has been tried out for a three-year period.

The second exception to the rule is that the publisher companies are prevented from obtaining current performance immediately. Some of those companies were marketed on the basis, as we understand it, of the Association's previous method of distribution, and it was felt that to permit them to elect full payment on a current performance basis would disrupt the matter. So a sug- [fol. 413] gestion has been made that a current performance basis as far as publishers are concerned would be deferred on a sliding scale so that it would be 75 per cent the first year and 100 per cent at the end of the period of five years.

Your Honor, I have used the term "current performance," and I would like to describe just what that is. Current performance, and in fact all performance, gives effect to three principal factors. The first is the nature of the use; that is, whether it is a use as a featured song or as an auxiliary use such as a background use. The second is the character of the musical work itself. The third is the place where the performance takes place.

The details of the first two, that is, whether it is an auxiliary use and the character of the work itself, are found in the weighting rules, attachment (C), and the

weighting formula which has been handed up with the judgment. The third you have already heard comes from the survey provisions. That is, they are economic multipliers and survey multipliers which give effect to the place where the performance takes place.

[fol. 414] The currency which is used to determine the amount of money which an ASCAP member is to secure is called the performance credit. In a typical case a man or a woman or a child sings a song on the radio or on television. This is called a feature performance, and under the normal course it gives rise to a single credit.

Exceptions include repeat performances on a single program, so that where more than eight performances are given in a single quarter of an hour or programming or radio or television there would be a decrease, and in those instances the use credit is reduced so that there is a maximum of one and each use beyond one secures 10 per cent. So that where more than eight are performed in a quarter of an hour there would be a pro rata reduction.

Second, copyrighted arrangements of works which would otherwise be in the public domain secure 10 per cent of the otherwise available credit unless they are part of a portfolio in which they secure only 10 per cent. There, however, are specific situations in which these arrangements receive a higher percentage. If the lyrics are entirely new [fol. 415] and only the title is the same and the melody, they receive 35 per cent of a use credit. If both the title and the lyrics are new, they receive 50 per cent.

Now, your Honor, I want to draw attention to this exception because it is one in which unusually in this decree there is some discretion. Copyrighted arrangements which have been substantially new melodic material as well as lyrics and title will receive 75 to 100 per cent determined by the special classification committee for public domain arrangements.

This same committee would determine within limits of 10 per cent to 100 per cent the value of arrangements of copyrighted material of four minutes or more in length, that is, serious works.

Along the same line, your Honor, extra credit is giving to a feature performance of a choral, symphonic or similar

concert performance when it has more than four minutes time. This extra credit is on an increasing scale so that, for example, if there is an hour performance of a single work such as a symphony that would receive 76 credits rather than one use credit. There is a special credit also [fol. 416] for performances in concerts in symphony halls where there is five times the credit given of the actual fees which are obtained from the symphony hall. And cultural symphonic orchestral programs on sustaining programs of a national network are awarded credit equal to performances on a radio network of 50 stations.

The next portion of the judgment relates to the different types of uses. Songs are utilized in other ways than in feature performances, as your Honor realizes. These other ways include the use of compositions as themes, background music, jingles, cue or bridge music, and they are described in detail and defined in both the weighting rules and the weighting formula. They are given credit principally in accordance with two factors. The first factor is the type of use, and the second factor is the inherent value of the music itself.

Every effort has been made in this area to reduce to a formula, to a mathematical certainty, the amount of credit which will be given, and let me explain. In a theme song, which is one of the five types of use of music which is subject to a reduction in value, the weighting rules permit [fol. 417] a distinction between compositions of not to exceed 10 to 1 depending upon the character or the reputation, one might say, of the musical work. This reputation of a particular work is determined by the number of feature performance credits which that musical composition has secured.

The tests to qualify for extra credit are of two kinds. First, the work must be well known, and the criterion has been 2000 feature performances since 1943. Also, there must be continued interest in the work with credits for the five latest available years amounting to 2500 of which no more than 750 will be counted for a single year.

A musical composition which meets these two tests is described as a qualified work and it receives a full use credit for all theme musical performances within an hour

and a tenth of a credit for all additional performances if the program goes to a two hour period.

A work which does not have this reputation and, therefore, is described as non-qualified receives only 10 per cent of the use credit for all performances within the first 60 [fol. 418] minutes and 1 per cent for all of those in addition after the first hour.

If a song is performed as a theme or as a signature sing and also as a background music or as a feature, the aggregate percentage which that song can obtain is limited to one and one-tenth credits for the first hour and one-tenth for the second hour.

There is also a special rule where two or more works are performed as part of a signature or a theme song, the sharing to be proportional to the percentage which each would otherwise have been entitled to receive.

Problems arose in determining the number of use credits which have accumulated since January, 1943 because ASCAP records do not differentiate between features and non-features before 1955. After 1943 there are records, but they only tabulate uses of any type. Before that ASCAP had no records. I draw that to your attention, for that is the reason why the dates are set as they are.

The rules provide for a presumption that there have been 20,000 feature performances if the work was listed in one [fol. 419] of four different ways. If it was in Prentice-Hall's Variety Music Cavalcade of 1952, the Lucky Strike Hit Parade or one of the ten top songs published in Variety or Billboard, the rules provide that there will be a presumption that it had 20,000 feature performances.

Where the work has not been performed this number of times it yet may get a higher percentage of a use credit than an unqualified work, that is, an unknown one, if it accumulates 15,000, 10,000 or 5,000 feature credits, provided it has also been popular within the last five years to the extent of showing 2500 feature performances of which no more than 750 were counted in a year.

The Court: Let me interrupt, if you don't mind.

Mr. Bennett: No, sir. I hope you will.

The Court: We have already seen that the money collected by ASCAP, the net result, has been divided into two funds.

Mr. Bennett: Yes, your Honor.

The Court: The publishers fund and the writers fund. At present the writers fund has divided into four separate funds.

[fol. 420] Mr. Bennett: Yes, your Honor.

The Court: The Current Performance Fund, the Sustained Performance Fund, the Availability Fund and the Accumulated Earnings Fund.

Mr. Bennett: Yes, your Honor.

The Court: Is it contemplated by the proposed amended decree to change that division into four funds?

Mr. Bennett: Yes, your Honor. It is contemplated that the writer at his own election may say "I want all my credits not on a fund at all but on the basis that my performances or that my work, rather, bears to all the performances that have been received."

The Court: That is, a writer may be given or will be given the occurrence performance option.

Mr. Bennett: That is correct, your Honor.

The Court: Assuming he does not exercise that option, would the four divisions or four funds still remain?

Mr. Bennett: There are four divisions, but they are different from the way they were before.

[fol. 421] The Court: You have changed them?

Mr. Bennett: Yes.

The Court: In what respect have you changed them?

Mr. Bennett: I wonder if it would help your Honor if I handed up a chart.

The Court: Tell the folks who are here. For instance, put aside now the option. We have now a current performance fund into which 20 per cent of the 50 per cent goes.

Mr. Bennett: Right.

The Court: A Sustained Performance Fund into which 30 per cent of the 50 per cent goes.

Mr. Bennett: Right.

The Court: The Availability Fund into which 30 per cent of the 50 per cent goes, and the Accumulated Earnings Fund into which 20 per cent of the 50 per cent of the writers fund goes. Are you still going to have those four funds?

Mr. Bennett: We are going to still have four pots, using a poker analogy.

The Court: I don't play poker. That is a luxury I can never afford.

[fol. 422] Mr. Bennett: Let's call them bins, your Honor. One of the bins that is going to amount to 20 per cent is the same. That is the Current Performance bin, and that is 20 per cent.

The Court: There is no change in that percentage?

Mr. Bennett: No, sir.

The Court: All right.

Mr. Bennett: Except, of course, your Honor, in that what a current performance is has to be to some extent changed.

The Court: No. I want to find out what changes have been made in the allocation, the overall allocation, to these funds.

Mr. Bennett: Yes, your Honor. It is still 20 per cent, and it is still per cent on membership continuity which is the seniority fund, which is the fourth of the funds which you mentioned.

The Court: The Accumulated Earnings Fund is 20 per cent. The other is the Current Performance Fund, 20 per cent.

Mr. Bennett: The Accumulated Earnings Fund was also based in part on the fact that a member had belonged for a period of years. This membership continuity fund is [fol. 423] also based on that theory.

The Court: You are not going to change the amount allocated to that fund?

Mr. Bennett: No, sir. That is going to be 20 per cent, and so is the current performance.

The Court: What have you done to the Sustained Performance Fund which was 30 per cent and the Availability Fund?

Mr. Bennett: We have changed that, your Honor. We said it is going to be an average performance of 30 per cent, and that is based on a five-year average instead of an election to have a ten-year average which was present before, and we have also changed the brakes. You will remember that under the old funds a man could for a period of a number of years, because his average had dropped, still have the peaks and valleys of performance straightened

out a little bit by a brake which was put on it so that he only got a percentage of the drop. We have changed that to an extent.

The Court: What have you done to the Availability Fund, 30 per cent?

Mr. Bennett: The Availability Fund, your Honor, is not [fol. 424] called that at all any more, but there is a 30 per cent fund which is determined by the five-year average performance of recognized works. Recognized works are works which have been published and are played once and then thereafter, after four quarters. That is, there has been a situation where a work has been published and at least a year afterwards it is still published again. That is a recognized work.

The Court: Let's come to the publishers' 50 per cent.

Mr. Bennett: Yes, your Honor.

The Court: Presently you have that divided into three funds, not four.

Mr. Bennett: Yes, your Honor.

The Court: The Current Performance Fund in which you give 55 per cent of the 50, the Availability Fund in which you have been giving 30 per cent of the 50, and the Seniority Fund, 15 per cent of the 50.

Mr. Bennett: Right.

The Court: Is it contemplated to keep those three funds?

Mr. Bennett: It is contemplated to keep three funds, [fol. 425] your Honor, but they are changed and one of them is going to disappear.

The Court: What one is going to disappear?

Mr. Bennett: The Membership Continuity Fund which is the one which is based on the fact that a publisher has been a member of the Society for a period of years. At present it is 15 per cent and by 1964 it is going to decrease to zero.

The Court: So that you are working out that so-called Seniority Fund.

Mr. Bennett: As far as the publisher is concerned, not as far as the writer is concerned.

The Court: So that after five years you will have only two funds of the publisher's moneys.

Mr. Bennett: That's right. One will be the Current Performances Fund, now 55 per cent, which eventually will be 70 per cent, and that is going to be by 1964.

It is called recognized works now, your Honor, and it depends on the same factor that we had before.

The Court: All right. You have some charts.

[fol. 426] Mr. Bennett: Yes, which I believe describes this. It is pretty rough.

The Court: Rough or not rough, you went to some trouble to prepare those charts. Take that colored chart and stand up there.

Mr. Bennett: May I give you a copy of it?

The Court: All right. Stand up there, and you just point out what you are talking about.

Mr. Bennett: Your Honor, does your Honor want to see this as well?

The Court: I have it here before me.

Mr. Bennett: I think it is going to be a little difficult to see this at that distance.

The Court: You have copies available?

Mr. Bennett: I have about six copies available, your Honor.

The Court: During the luncheon recess, if anybody wants to look at it, they may see this graphic representation, and you may use it if you want to when the time comes when you speak as a friend of the Court. You describe what you have there and what that is supposed to represent.

Mr. Bennett: Up in red in this corner is an indication of [fol. 427] where the performance credits, which are the currency under which you secure a distribution are described.

In the first place, you are going to get an evaluated random survey from this survey of performances, and then they are going to be divided into feature performances, themes, background, jingles, cues and bridges; and the amount which the themes, the background, the jingles, the cues and the bridges are going to receive is based on the number of feature performances. So that I've got a little wheel here which indicates that that is the control of the amount that flows on themes, on background, on jingles and on cues and bridges.

Over at the other side where all the performance credits come down I've got another little wheel right in the middle of this chart, and that activates several other shafts which you will see down the side. First it activitates the current performances both of the writers and of the publishers and the Current Performance Fund in the event that there is not an election made and the regular formula of ASCAP pertains.

[fol. 428] The Court: Now let me ask you one question for the benefit of those about whom you are talking. You are talking for me, too, I trust.

Mr. Bennett: Yes, your Honor, I am, sir.

The Court: Does this chart represent the present method of distribution or the proposed method?

Mr. Bennett: The proposed method, your Honor.

The Court: You speak now on this chart of the proposed method.

Mr. Bennett: And it should have a word in here which it doesn't have, the words "rough sketch," because there are in this chart refinements which it does not show in the chart as a whole.

Mr. Eastman: Your Honor, might I indulge you as head of the town meeting by asking a question to get some information?

The Court: Not at this point while he is making an exposition.

Mr. Bennett: Would you like to look at this, Mr. Eastman?

[fol. 429] The Court: I want to be very informal because this is essentially a business matter and I believe in approaching it on an informal basis as much as I can. Nevertheless you are still in a court of law. You gentlemen as members of the Bar will observe that.

Go ahead now.

Mr. Bennett: Your Honor will note that the funds which come from various types of places, radio, TV, concerts and others, are put in this bin on the righthand side and that they flow down, again activated by performance credits, into two main areas, first the writers' share which is 50 per cent, and second the publishers' share.

Off the writers' share there is a little separate fund of 5 per cent which is taken off the top in which the special awards can be made primarily for those types of music which are not generally the subject of particular recognition, but they are matters which are very useful to the musical profession and things which should be recognized.

Then you will note that from that down at the bottom of the writers' share of bin I have something which is called "election," and there are two ways that the money flows [fol. 430] from there. One is down to a bin which is called "Current Performances" and the other is down into a bin which is called "Regular Performances," and from that "Regular Performances" are four smaller bins which are called "Current Performances, Average Performances, Average Performances of recognized works" and "Membership Contribution."

On the other side of this 50 per cent distribution is the publishers' share. There is an election likewise there of the regular formula or the current performance formula. I am pointing these out to you as I tell you about them. Under the regular formula there are the three funds or bins, the Membership Continuity Fund of 15 per cent which is going to decrease to zero by 1964, the Recognized Works Fund which is 30 per cent, and the Current Performance Fund which amounts to 55 per cent and which will increase to 70 per cent by 1964.

Does your Honor have any questions in connection with that?

The Court: I suggest, Mr. Bennett, that during the recess you leave that up there on the board some way and [fol. 431] then you leave a couple of copies around here so that anybody who wants to look at this chart—leave a couple of those photostats here—anybody who wants to examine this during recess may do so provided you don't take it with you.

Mr. Bennett: Very good, your Honor. We will leave those with the Clerk.

Your Honor, I have told you that we have tried to decrease the judgment factor here to the extent that we could by having these divisions determined by a mathematical formula. Would your Honor care to have me

describe that mathematical formula in detail, or would you prefer that we did not?

The Court: Not at this point unless somebody brings it up later on. Then you may.

Mr. Bennett: Then let me pass over that. Suffice it to say—

The Court: Are you satisfied with this for the present, this mathematical formula that has been devised by these experts?

Mr. Bennett: Your Honor, it has been a matter of negotiation. We think it is the best we can do, and we think it is particularly good in that it is a certain matter.

[fol. 432] The Court: Then suppose you go to the next point that you are going to talk on and save any comments you have for your answer after we have heard from the others.

Mr. Bennett: Very good, your Honor.

The Court: What is the next point?

Mr. Bennett: There is a limitation which I want to draw to your Honor's attention applying to short serial dramatic programs which are presented two or three times weekly, and in that all but feature performances are given only 5 per cent of the otherwise available credits.

The Court: Now you were going to speak about item V, weren't you?

Mr. Bennett: Would your Honor indulge me for a moment?

The Court: Yes. Have I handicapped you by taking this? You can have this book back now. It is better for me to be handicapped than for you because I have time for deliberation.

Mr. Bennett: You were talking about VI and V. I want to finish with Section III in just one more minute.

[fol. 433] The Court: I thought you completed that.

Mr. Bennett: No, your Honor.

The Court: It is amazing the way these lawyers keep these convenient arranged books for their own use.

Mr. Bennett: There is a special limitation on the short serials that I have indicated to you, and there is also a formula which decreases the value of background uses and of the other special uses like jingles and cue and bridge

music. There is, thirdly, a special method of distribution which takes place in connection with foreign as distinguished from domestic distribution.

In connection with foreign distribution, your Honor, the method that has been used in the past—

The Court: I don't think we need spend too much time on that.

Mr. Bennett: No, your Honor.

The Court: The total revenue is about—

Mr. Bennett: Let me pass on, then. There is a special method as far as that is concerned.

The Court: You base it now upon reports from England and Sweden?

[fol. 434] Mr. Bennett: That is correct, and it is going to be now:

If it is over $200,000, and they have the available information, it is going to be distributed on a current performance basis just as if it were in the United States.

The Court: All right.

Mr. Bennett: But, if it is under that, they are going to have to use the best means they can because I am informed and I believe that it would be too expensive to do it in any other way with the difficulties we have of language and what-not.

With that, your Honor, may I pass to Section V now, which is the next section and which provides how the provisions of Section XIII of the 1950 judgment shall be carried out.

It implements paragraphs (B), (C) and (D) of Section XIII of that judgment by prescribing the detailed and more specific duties with respect to the tabulation of data, the rights of inspection and the method of appeal.

Paragraph (A) requires copies of the decree and any rules and regulations affecting rights in voting or distribution to be supplied to each member of ASCAP.

[fol. 435] Paragraph (B) ensures the maintenance of a current mailing address of all members to be available for inspection by all members who have been members for at least a year, and it leaves any member the right to have his address confidential, but it provides that the Association in that case must send the unopened mail to him.

Paragraph (C) provides that ASCAP must maintain an alphabetical list of all compositions which receive performance credits broken down to show feature performances and those of other users. These records will be kept available for inspection, and any member has a right to examining what credits have been given to his own contribution. Provided he acts in good faith, he can check the credits of other fellows, and if he has good cause he can go ahead and examine all of the records of the Association on the subject. There is a limitation that a fellow has to be a member for a single year to have this general right simply so that curiosity seekers are not going to come in and disrupt the records of the Association.

[fol. 436] Paragraph (D) compels ASCAP to establish a special board elected, as are directors, that is, in the same weighted manner that Mr. O'Donnell has described, to hear complaints affecting the distribution of the Society's revenues.

Your Honor will recall that one of the complaints of the existing system is that it goes through the board of directors to a classification committee.

Complaints under the new system would be filed within nine months unless it could not have been reasonably determined from the annual statement. The procedure of the board and the right of appeal to an impartial panel of the American Arbitration Association is provided for in the judgment. There is a requirement of prompt payment after the decision is rendered, and there is also a requirement in paragraph (C) that the stenographic transcripts be made available to the members at cost.

The effects of these further provisions are to insure that the distribution shall be fairly made and that the fruits of the competition shall be fairly secured to each member. The [fol. 437] membership has been assured at the meetings at which Mr. Dean spoke that, if a member has any legitimate reason to secure ASCAP records in connection with his financial interest as a member, there will be no problem concerning it.

May I now turn to paragraph VI, unless your Honor wants to ask any questions concerning paragraph V, Section V.

The Court: No, I have no questions at this time.

Mr. Bennett: Section VI of the proposed amendment has three paragraphs, A, B, and C. This would implement Section XV of the 1950 judgment which required ASCAP to admit to membership authors and composers who have had one work published and/or, in the case of publishers, who had been engaged in that business for at least a year. The proposed amendment seeks to insure that this will be properly carried out.

Paragraph A provides for a reconsideration of all applications for membership which have been previously denied and the retroactive admission of applicants provided they had at the time of their original application met the [fol. 438] requirements and have not granted to anyone else the right to license the public performance of their works.

Paragraph B compels ASCAP to publish in two of the recognized trade publications twice a year a public statement of its willingness to accept members in accordance with the judgment.

Paragraph C provides that the fact that the ASCAP survey has failed to disclose a performance of an applicant's work shall not be the reason for refusing membership if he can show in other ways that he meets the requirements. It also requires ASCAP to inform an unacceptable applicant specifically how his application fails to meet the requirements of the judgment.

Your Honor, we have now described to you the provisions of the judgment in general terms, and I move, your Honor, that it be accepted.

The Court: All right. I understand now that it is the considered judgment of the Antitrust Division of the Attorney General's office that this proposed amended decree is the best in their judgment that can today be devised and framed.

Mr. Bennett: That is my understanding, your Honor; that the alternative would be litigation on the subject.

[fol. 439] The Court: And that your Department recommends it to the Court without reservation of any kind.

Mr. Bennett: That is correct, your Honor.

The Court: All right. I think at this time I have some

people coming in at ten minutes to one to see me, and I thought we would take a recess now until two o'clock.

This afternoon, then, Mr. Dean, I will hear you, and I was going to suggest that, since the Government made such a lengthy statement concerning the decree, perhaps your comments should be brief in the beginning and perhaps you should save your comments until after we have heard—I mean save them in large measure—from those who have indicated that they desire to be heard as friends of the Court.

Mr. Dean: Very well, your Honor.

The Court: If that is agreeable to you, Mr. Dean.

Mr. Dean: Yes, your Honor.

The Court: I think it might work out better.

[fol. 440] Mr. Dean: All right.

The Court: All right. Then we will come back, with the help of the Lord, at two o'clock.

(A luncheon recess was taken.)

[fol. 441] AFTERNOON SESSION

2:05 P. M.

The Court: Gentlemen, I am sorry I kept you waiting. What did you want, sir?

Mr. Bradford: I was delayed this morning.

The Court: I saw you here.

Mr. Bradford: I know it.

The Court: Are you a member of the Bar?

Mr. Bradford: No, sir.

The Court: Are you a lawyer?

Mr. Bradford: No, sir; but I want to speak, because I own four firms, as a friend of the Court.

The Court: You own what, sir?

Mr. Bradford: I own four firms. Acme Music Company, Blues Music Company, Perry Bradford, Inc., Perry Bradford Music Publishing Company.

The Court: And you want to be my friend, do you?

Mr. Bradford: That is right. I want to be your friend.

The Court: I can't refuse the hand of friendship.

Mr. Bradford, you sit down there, and I will put your name on the list. If you have four music publishing firms, [fol. 442] I will hear you, sir.

Mr. Bradford: That's right, I have four of them.

The Court: Mr. Dean.

STATEMENT BY MR. DEAN

Mr. Dean: If it please the Court, it seems to me that Mr. O'Donnell and Mr. Bennett made a very fair and objective presentation of the proposed decree, and in accord with your Honor's suggestion I will not go through the proposed decree in detail as I had planned.

I might say that when I was first retained in this matter I felt somewhat like Jack Donohue did in the musical "Sonny." You may remember he comes onto the stage—

The Court: If I were to tell you that was before my time, you wouldn't accept it, but I heard about it from my father.

Mr. Dean: He comes onto the stage dressed completely in what looks like Abercrombie & Fitch jodphurs and boots, and one thing and another, and someone says to him, "Jack, you have never been on a horse."

He says, "I've got that all fixed. They are going to put me on a horse I have never been on."

That is the way I felt when I first examined this whole setup of the musical publishing field in radio and television [fol. 443] broadcasting, and the relations of ASCAP to its members and its history, because I am sure your Honor is well aware when ASCAP was first organized it was exceptionally difficult for the average songwriter, or the writer of lyrics, to get paid for his work. And as radio broadcasting developed, and later television broadcasting developed, it became exceedingly difficult for the average individual engaged in songwriting to take off the time to try to negotiate, or to hire lawyers to negotiate for him, or he found as an individual he was more or less helpless in dealing with the large aggregations with whom a society like ASCAP has to deal on his behalf.

Your Honor is quite familiar with the earlier litigation that came on for trial before Judge Goddard in 1935, and with the consent judgment entered in 1950.

I might say, generally, that it seemed to me, after examining the letters of complaint from the members, and after conferring with the Department of Justice, and we had some 30 or 40 conferences with them of some length, that the first thing that ASCAP ought to do was to bring in a completely independent organization with skill in its field to make a survey of television networks and radio networks and local television and local radio, and the other [fol. 444] media, on which these songs were performed, to try to work out some survey that would be completely independent and as accurate as people skilled in this field would know how to make it.

As your Honor knows, this random or scientific sampling is not a public opinion poll like the Gallup poll. There they have no way, except by further study of the mathematical laws of probabilities to test the accuracy of their surveys, except in the election itself, by going back and seeing whether they made errors. This is quite different. This is to ascertain the margin of mathematical error in these surveys, and then to try to reduce that margin.

They designed samples which are based upon the amount of revenues that ASCAP receives from the various media, and the various geographical locations of the radio or the television stations, and they take samples, they work out fee performance credits, and they work out mathematical multipliers, in an effort to try to get these as accurate as they can.

Now, each time they take a sample they go back and check for their margin of error, and then they have this checked against tapes, and they use various means and methods of trying to reduce this margin of error.

[fol. 445] I made a survey of the people engaged in this field, and on behalf of ASCAP I came to the conclusion that Joel Dean, who is a well known professor at Columbia School of Business, has also had his own organization—I would like to claim him as a relative, but I assure you he is no relative of mine—that he was one of the ablest people in this field.

We then suggested his name to the Department of Justice, and we had Joel Dean outline the kind of a survey he was going to make, and the Department of Justice, as I

understand it—I want to make it clear that I personally had no conversations with the Census Department—but I believe they have said that in principle that they thought the method of sampling, and the method laid out by the Joel Dean Associates, was scientifically correct, but they did say that even the best survey would depend upon how it was done, or how economic conditions changed, or whether some new media would come into play as television came in, which to some extent surpassed radio; and that, therefore, there ought to be some means and method whereby the Court, and the Department of Justice, would have some means periodically of checking up as to whether this survey, which Joel Dean Associates started the 1st of October of this year, was correct.

[fol. 446] We sent to all of the members, and have filed with your Honor, a memorandum sent out by the Joel Dean Associates, outlining the various methods of sampling, their multipliers, and how they propose to go about it, and I think as you read that memorandum you cannot help but be impressed with the fact that they say again and again that they have to constantly review their methods, and their data. That is the last memorandum in the book but one, your Honor.

The Court: Yes, I have it.

Mr. Dean: That is why we put this provision in here, after going back to page 4 of the proposed order, and B reads that:

> "After 18 months from date of entry of this order, plaintiff may seek additional relief in respect of the provisions of this section, including the scope, size, or accuracy of the survey. In any such proceeding the plaintiff need show only that the survey does not establish, or is not being conducted in accordance with, generally accepted principles of scientific surveying or sampling; that the economic multipliers do not adequately reflect the dollar value of ASCAP's perform-
> [fol. 447] ances in these various strata; or that the sample is not of sufficient size or accuracy to present a reasonably accurate distribution of ASCAP's revenues on the basis of its results, and in such proceeding

the court may consider the cost of such additional relief."

There was never, as I understand it, any question but that Joel Dean Associates were perfectly competent and completely independent, but that since they were engaged to establish this survey, and to set it up, on the advice of the Bureau of the Census, the Department thought that they ought to have this additional provision, and since, on behalf of ASCAP, we want to be very sure that the survey was completely accurate, or as accurate as the human mind knows how to make it, we readily agreed to this provision.

Then we also agreed to provision C, II, on page 4, that "The Court, after hearing the recommendation of the plaintiff and the views of the defendant, shall appoint a qualified independent person not an employee of either of the parties who periodically, as is necessary, shall examine the design and conduct of the survey, make estimate of the accuracy of the samples, and report thereon to the Court and the parties. ASCAP shall pay the salary and [fol. 448] reasonable expenses of such person."

There isn't any obligation on your Honor to appoint such additional expert unless your Honor considers it is necessary.

The Court: Then why is the provision in the proposed decree?

Mr. Dean: Because if there were complaints to the Department of Justice, or if upon further submitting the actual results of the survey to the Bureau of the Census, or to other experts, the Department might feel that they would want changes made in the survey, the census on the basis of the survey, that the revenues of ASCAP are to be distributed to its members, we felt it only fair and proper that the Court should have this power, if it wished to exercise it, and that ASCAP should agree to pay for it if the Court wished to have the survey brought up to date by another sampling expert.

That is the history, and those are the reasons why those provisions are placed in the order.

The Court: The Court, on its own motion, cannot, and because of its own facilities limited as they are, supervise

the conduct of the parties after a decree has been signed, and the Court does not wish to be represented in such a position where it may be regarded as being a supervisor. [fol. 449] That, primarily, is the obligation of the Antitrust Division of the Attorney General's office, and they have authority and power under the law to come in at any time with reference to almost any antitrust decree, particularly a consent decree, with reserved jurisdiction, and apply for a modification of that decree where they find a change of conditions, simply as they would have done here if they had not been able to reach some agreement with your clients.

I do not know but what it isn't desirable to have somebody, as a sort of judicially appointed policeman—let's call him that—who would look at these reports once every three months, or once every six months, and say, "This thing doesn't look right to me," and he files a report to the court.

The trouble is otherwise you are placing a burden and obligation on the Court for which it hasn't the facility or the time, even though it has the inclination, to exercise this supervision.

However, that does not seem to be too important. The point involved here is do you feel, Mr. Dean, representing the Society, that you have accomplished the best possible results in light of the purposes of this suit for the Society as a whole and for its individual members?

[fol. 450] Mr. Dean: Yes, your Honor, I do. I can answer that unqualifiedly yes.

The Court: Are you prepared, after we hear those who desire to be heard, to answer and give your views as to any objection they may raise as to any specific section?

Mr. Dean: Yes, I am, your Honor.

The Court: I do not want to cut you short, and you go ahead with what you had in mind to say, but I wanted everybody to know that that was your position, that you are here not to conduct a debate, but after everybody was through, that you would try to explain what you felt were the major objections raised.

Mr. Dean: Yes.

The Court: All right.

Mr. Dean: To be very brief in about two minutes, your Honor—

The Court: Don't feel I am at all rushing you at this point. I don't want you to feel that way.

Mr. Dean: I do not see any point in going through the decree, because I think it has been very well covered.

I might just say, because Mr. Schaeffer, in correspond-
[fol. 451] ence with us, as representing, I believe, an organization—

The Court: That is the member of the Bar from Chicago?

Mr. Dean: Yes. —has raised a question as to whether or not we would be willing to take the logs of ABC, the music played over the ABC radio networks, and check them against our tapes.

The answer to that, of course, is yes, we would be glad to do that.

I would like to point out, however, that in connection with these local radio stations, that the objection has been made to this so-called survey sampling on the ground that it would be better if we took a complete census. There are something ten million hours played, and if we were to have to do that complete census, and have to keep each log checked, and check it against the tapes, it is our estimate, in which our experts concur, that it would take practically the entire revenues of ASCAP.

So that what we have been confronted here with is to try to get up a survey that is just as accurate as we know how to make it, without at the same time using up every dollar of revenue.

[fol. 452] We could, of course, increase the accuracy of this thing, and then not have any net money to distribute, and I am very sure that that would not be very popular.

I might say at this time I would be quite willing to answer anybody. We are also prepared—your Honor has already ruled on this point, so I won't discuss it at this time—but it seems to us this is not a class action, and that the Department of Justice is fully capable of representing all of the interests of the members.

With that statement, your Honor, I will pause at this time and be prepared to answer any questions, if any

further questions are raised during the course of presentation by the friends of the Court.

The Court: Thank you, Mr. Dean.

I think that is a better way, and I am glad you accepted my views on it.

Mr. Dean: Yes, sir.

The Court: Now then, suppose at this time we call each one of the parties who asked to be heard. I am going to hear them one at a time.

I think it would be better to have all of these parties address the Court, before we hear again from Mr. Dean, [fol. 453] it being my idea that as each man talks he may have the opportunity of making a note as to what they said rather than have him speak as each man speaks. That might lead to confusion, and might lead to a debate, and we do not want a debate in that sense.

Mr. Eastman, I think you are the first on the list. Do you mind coming up, and if you gentlemen do not mind using the same rostrum that has been used before, I think it better that everybody hear what you have to say, so that in that way we might avoid repetition of statements to some extent.

STATEMENT BY MR. EASTMAN

Mr. Eastman: May it please the Court, I think offhand, your Honor, it might be helpful if I submitted to you a copy of Mr. Dean's remarks to the general membership. This is by way of explanation—

The Court: I have had a copy mailed to me at each one of Mr. Dean's addresses. As I recall, there was one on August 26th, and there was another communication—that was the address on the west coast of August 18th.

Mr. Eastman: Yes, sir.

The Court: And I have another one that was sent to me, and I have read them all. I have an address in New York on August 27th, and then I have a communication which was sent out under date of October 5th, concerning [fol. 454] the Dean survey, and then I have a further communication which was sent out by the Society on the date of October 9th.

Then, of course, I have the original booklet, which contained a copy of the order which was sent out, I think, early in July.

So those have all been submitted to the Court, and have been read by the Court.

Mr. Eastman: Your Honor, I represent 54 writers, all of whom have been members of ASCAP for many years. They call themselves the Current Writers Committee. They are serious, responsible writers who in the past year have produced 25 per cent of the ASCAP hits.

At a recent meeting, I believe at the time Mr. Dean addressed the general membership, they had produced seven-eighths of the hits ASCAP then had.

Among the 54 I believe there are three or four of the superdreadnaught group, so that this group is an extremely responsible and important segment of ASCAP.

I believe, your Honor, that this problem must be considered in the light of ASCAP itself, because we are merely addressing ourselves to the question of distribution of funds. I think there are related problems in terms of survey, and weighted vote, but we felt that since there [fol. 455] are others addressing themselves to this Court on other issues, and the question of distribution was such an important one, that we would confine ourselves entirely to this terrible issue of distribution.

I would like to add, your Honor, that there is no question about ASCAP's being managed by honorable men, but Balzac spent his entire life talking about this corrosive effect of money, and this has lone a terrible, terrible thing.

The Court: It was nothing original with Balzac. He also talked about other weaknesses of man, didn't he?

Mr. Eastman: We will confine ourselves to money.

The Court: And there is nothing new about that, either.

Mr. Eastman: Now, ASCAP was started, roughly, in 1914, at a time when a courageous group of men, and a brilliant lawyer, Nathan Berkon—

The Court: I used to be a lawyer. You can assume I had clients come to me in the early days of my practice of law, right after World War I, and I got a little notice from ASCAP that they were playing these Wurlitzer piano [fol. 456] machines, and I had to get a license for $15 a

month, or $5 a month, so I am familiar with the history of it. I looked it up in those days, and my clients paid the fee to ASCAP—they also paid a small fee to me, too.

You assume now I know all about it, and I used to be a lawyer. Now, let's get down to this thing.

Mr. Eastman: In any event, your Honor, I think it important to know that in so far as a writer is concerned they break into three divisions. You have the superdreadnaught group, a group, roughly, of 100 extremely active writers who will, under any circumstances, receive large sums of money. In fact, they receive such large sums that they have generously decided, under certain conditions, not to take $2,000,000 a year in order that others may be benefited.

You have a second group whom I also call founding fathers, who made great contributions in years past to ASCAP, but, unfortunately, as the years have gone by they have become inactive and unproductive, but they have always felt that ASCAP was theirs, they were the ones who created it, and the pot was for them and nobody else, and in a sense they should have the major share of this distribution.

[fol. 457] Then you have the new group, the current writer, the current writer who feels he is being discriminated against, and who feels he is not getting his proper share.

Until 1950, we had this subjective evaluation system. Your Honor, it was an awful one, because the men who controlled the votes simply said what a work was worth. The result was that those who were in power capriciously and arbitrarily would say, "This work is good, and this work is bad." And the result was a most dreadful system of distribution.

The Department of Justice recognized that, and in 1950, after serious efforts, a change was made and the parties, presumably, enunciated a new doctrine. Primarily, consideration was to be given for performances.

As a result, we had, theoretically, a new system. We now had 20 per cent of the current performances, 60 per cent for sustained performances, and 20 per cent for seniority.

Now, the 20 per cent for seniority was theoretically a way of paying off the founding fathers. The 60 per cent theoretically was a combination of the two. And the 20 per cent was merely current performances.

Now what happened, your Honor, immediately after this decree went into effect? The first distribution one year [fol. 458] later proved that there was a serious dislocation of income for the founding fathers, and the unproductive and inactive writer suddenly found himself with a serious loss of revenue.

Well, it became apparent that this primary consideration for performances would not work for this unproductive and inactive group.

I would like to point out, collaterally, that the superdreadnaught group will not suffer under any system.

The Court: Just who do you mean by the superdreadnaught group? Do you mean the men who are fortunate enough to hit the fancy of the times and turn out tunes that are popular?

Mr. Eastman: Forgive me, your Honor. I thought that the government—I simply adopted the government's term, and its memorandum refers to the superdreadnaught group. I thought, for convenience, I would take that.

The Court: The government uses a lot of terms. Sometimes I discard them.

Mr. Eastman: Well, the top 100 writers, your Honor.

The Court: The top 100 writers you call the superdreadnaughts?

[fol. 459] Mr. Eastman: The government called them that, and I adopted the term.

The Court: Superdreadnaughts are a thing of the past, I take it. But tell me, seriously, of the carrier ships.

Mr. Eastman: In any event, your Honor, this superdreadnaught group, collaterally, is so active in its own affairs, for example, Mr. Hammerstein is so busy, and Mr. Rodgers, and Mr. Berlin, in producing shows and producing songs, that they have not really got time for the consuming duties of an officer of ASCAP, and the result is that this whole issue has fallen to this second group of inactive and unproductive writers.

What happened in 1950, after it was found there was a

serious dislocation by virtue of the fact that primary consideration for performances was destroying the income of this group?

This is a serious matter, your Honor, and if I am mistaken I would like to have the Department of Justice correct me, but my understanding is—and I have checked this as thoroughly as I know how—that a year thereafter the directors of ASCAP, without the approval of the Department of Justice, changed this 60 per cent performance fund to be divided into two groups, 30 per cent [fol. 460] called sustained performance fund and 30 per cent called availability, but availability is a misnomer and a phony, it is nothing more than sustained performance with brakes.

In other words under the old 60 per cent formula you could rise or fall as your performances went. With this division of 50 per cent in sustained performances you still had that, but the availability fund, the other half, suddenly developed a series of brakes so that you could not fall during a five-year period, and if you did fall the fall was very, very narrow.

So that this fund improperly labeled availability was nothing more than an attempt to destroy the consideration of primary performances, and to featherbed, so that the inactive and unproductive founding fathers now had a soft bed for a portion of their funds.

My understanding is that the Department of Justice never gave its approval, and that despite the 1950 amended decree which provided for 60 per cent sustained performances, ASCAP took it upon itself to change this and to destroy the value of the decree, your Honor, because they immediately went back to subjective evaluation in terms of half that sustained performance fund, and promptly went back to benefiting the founding fathers.

[fol. 461] The government, on page 18, has summarized the situation as it existed at that time. In summary, the overall effect of ASCAP's existing distribution system is that more than 80 per cent of all moneys distributed to authors and composers, members, are now distributed on a basis which does not give primary consideration to performances as contemplated by Section VI of the 1950

judgment. The system further perpetuates the Society's pre-judgment subjective system of classification. Instead of making distribution to its members on a basis which gives primary consideration to performances, under ASCAP's present system some writers initially receive as little as 13 cents per performance, and others as much as $25 per performance.

Your Honor, summarizing again the effect as I believe the unapproved change in this 1950 decree made it, the government found—

The Court: Mr. Eastman, am I not concerned only with whether or not this presently submitted proposed decree is an improvement?

Mr. Eastman: Your Honor, I must relate to the old one, because I will show your Honor, I believe, that a shell game has been practiced, and these are harsh words, [fol. 462] your Honor.

The Court: I am not concerned with the past.

Mr. Eastman: This is the present.

The Court: There is no present. It is either past or future.

Mr. Eastman: I am talking about the future then, your Honor.

The Court: As we talk, it becomes past.

Now, let me ask you, if you don't mind, I don't want to curtail you in any way, but I would like to have your arguments focused so that I can appreciate their full force and effect.

Do you contend that this proposed decree that is now before the Court is not an improvement upon the present decree?

Mr. Eastman: Your Honor, I so propose, and my committee of 54 responsible writers are content to take 1950 rather than take the new decree, and we will so elect as of now. We feel this is the most terrible thing that happened to us.

The Court: Now, one more question. What particular section of the proposed decree do you object to?

Mr. Eastman: I will get to that, if I may, your Honor.

[fol. 463] The Court: Yes. Let me focus my attention on it.

Mr. Eastman: Yes, your Honor.

As I understand it, the reason I went a bit into the past was admittedly 80 per cent of the old system did not primarily represent performances. Now, we can build a very easy syllogism, your Honor, Mr. Dean in his remarks, and the government in their remarks, have indicated that one alternative is substantially the same as that which existed in the past; in other words, not the current performance fund, but the second alternative is substantially the same as the old.

Mr. Dean has stated that as follows—

The Court: Let's keep personalities out. We have no jury here. You are talking now to a Judge who is trying to find out just what he should do, and trying to be fair to accomplish the purpose of the antitrust suit.

Mr. Eastman: Your Honor, I am simply trying to say this—

The Court: Will you answer my question, so I can find out from you what particular sections of the proposed decree you object to?

Mr. Eastman: I simply confine myself, your Honor, to [fol. 464] distribution, which is the third point.

The Court: What part of that third point, distribution, do you object to?

Mr. Eastman: 3-A and B, your Honor. 3-A, really.

The Court: 3-A?

Mr. Eastman: Right.

The Court: Is it fair to say that you, speaking for your clients, object only to 3-A?

Mr. Eastman: No, your Honor. We object to many further portions of the proposed order, but we felt that it would best to heighten the problem for these writers by confining ourselves to 3-A.

The Court: Now, 3-A, as I recall—if I am wrong, correct me on this—is the provision that will ultimately wipe out that membership distribution, is it?

Mr. Eastman: Well, I think it perpetuates it, your Honor, under unfavorable circumstances.

The Court: According to the notation here, it is to be wiped out by 1964.

Mr. Eastman: No, I think you are talking about the publishers, your Honor.

Mr. Dean: That is the publishers.

Mr. Eastman: We are talking about writers.

[fol. 465] The Court: It has to be 20 per cent.

Mr. Eastman: No, I am sorry, your Honor. I am talking about the entire writers distribution which, if I am not mistaken, is set forth in 3-A of the proposed order. Is that not so, Mr. Bennett?

The Court: I have it. Now, 3-A—

Mr. Eastman: Now, your Honor, I was trying to build a very simple syllogism for the Court by suggesting they now offer two alternatives. Either you go on, theoretically, 100 per cent performances, which is the one alternative, or else you go on the other, which contains four funds—current, sustained, availability of now recognized works, and seniority.

I am trying to suggest, your Honor, that this is a snare and delusion, and that the second alternative of current performances, sustained performances, availability and seniority, admittedly, are improper since they are substantially the old, and I would point out to your Honor a great new factor has been added which makes it even worse for my clients, but I thought that I had an admission, both from Mr. Dean and the government, that the second alternative was substantially the same as that which existed up to now, and that the government had set forth that admittedly was not a system which permits of [fol. 466] primary consideration for performances. In fact, 80 per cent does not.

I simply tried to indicate that the government had had slipped to it an old shell game by saying "Keep this old system, but for those who want current performances we will give them another alternative called current performances."

I would like to point out it is not so.

Mr. Dean himself, in the statement that the business of writing is so hazardous that no one wants to accept this feast or famine affair, and take performances, assuming they were 100 per cent, what happened here? If there were a writer bold enough or courageous enough to

take such a system, he would be getting 60 per cent of 100 per cent, and not 100 per cent at all. For the following reasons. The government has now worked out, or bought the theory of a qualifying work. Now, a current writer writing current songs does not qualify with his current songs for qualifying works. The government states, in its brief, in its memorandum, that 40 per cent of all moneys paid to ASCAP members is for themes and background music.

In order to get the 100 per cent share of that you must have a qualifying work, your Honor. Thus, you find your-
[fol. 467] self in the strange, awful position that even if you have the courage to accept current performances as your sole payment plan you find yourself only getting 60 per cent of the pot or bin, as the government would have it, not 100 per cent.

In addition, what has ASCAP done? It limits you to 39,000 points, your Honor, so that if you get more than 39,000 points you cannot accept that alternative at all. You must now be relegated to the second system, and accept the benefits as they are set forth in the second system. So that again you have this whole affair there of 39,000 points and you are finished, nothing further goes along with that.

I got the impression from Mr. Bennett, I asked him subsequently, whether a recognized work was also included in this affair of current performances, and I was told "Yes," which means now there are two hooks in this. If you have a recognized work, which is not recognized at all, that is a misnomer, it is simply a work one year old—seniority again—if you have a work one year old you can qualify for certain background uses—themes, and what-not—under certain circumstances. But if you have a current work, you do not qualify at all. So that you have now a system whereby 40 per cent is destroyed of your
[fol. 468] total pay, 39,000 points are completely gone, and you have nothing further to say about that.

I obviously suggest, your Honor, this is hardly a fair proposal where they say to a member "You may elect, if you like, to take performances on a 100 per cent basis."

This is not true at all. This is nothing more than 60 per cent, and not a 100 per cent basis.

The Court: By that I take it you mean then that most members in your clients' position would not take the benefit of the option?

Mr. Eastman: They could not, because they are not getting a fair shake.

The Court: But they would still have the regular formula to work on, wouldn't they?

Mr. Eastman: Which the government admits was bad. But, your Honor, there is one more point on that current performance basis.

The Court: What would you suggest in place of what has been proposed?

Mr. Eastman: Well, your Honor, that is a big question.

The Court: Well, that is the question, I think, logically that comes to mind of any thinking man.

Mr. Eastman: Your Honor, it would be presumptuous [fol. 469] on my part—

The Court: No, it is not presumptuous. I have asked you the question. What would you propose instead?

Mr. Eastman: That it become a democratic institution and paid for performances.

The Court: I know, but that is a lot of—

Mr. Eastman: No, your Honor, a straight performance society.

The Court: We used to say that is a lot of apple sauce. It means nothing.

Mr. Eastman: Your Honor, I suggest this. Old Man River, of course, is a more important work than Eastman Boogie.

The Court: I know Old Man River, but I don't know about that Boogie.

Mr. Eastman: Old Man River is, obviously, going to get many more performances because it is a great work, and that is where it will be paid off.

The Court: But, Mr. Eastman, what would you suggest in place of what has been proposed?

Mr. Eastman: I would rather go back to 1950, because what they have done is—

The Court: You say leave it unchanged, do you?

[fol. 470] Mr. Eastman: I do not want to leave it unchanged, obviously.

The Court: You said go back to 1950, and you leave it unchanged.

Mr. Eastman: What we are getting now is worse than 1950, is what I am trying to suggest, and I suggest that every song should be considered on its own, paid for on a straight performance basis. Every time you get a performance, you get paid. Cut out themes and background, and don't limit the mathematical formula.

The Court: Sometimes you get so bogged down with a lot of statistics and calculations you end up nowhere. It is like an inventor figuring that he is going to have an invention on which he is going to get a patent, and make so much on each item, and he will sell so many of them, and if he makes so much on each one he will get that much, and by the time he puts the pencil down he has got a million dollars, but he hasn't got a lawyer to defend his patent.

Mr. Eastman: What I suggest is that you feed into the IBM or Remington machinery the performances, and you have a set of evaluation for your works, all works, and there you are.

But, your Honor, what I am trying to get at here is that [fol. 471] what they did was the most dreadful thing of all, because even under the old system of 1950, which had partially some primary consideration for performances, although the government only found 80 per cent, they now slipped into a fund the thing called recognized work.

Now, a recognized work is nothing more than a work one year old, so that Eastman Boogie is now one year old, it is a recognized work, your Honor, which is a fallacy, of course. So what they have done is this. They have now worked out a system whereby instead of getting heavy performances, they now take availability, which is called the recognized work fund, and it might be the biggest piece of trash ever, but if it is one year old it gets to be a recognized work and gets credit, whereas the finest song less than a year old gets no credit at all.

I am suggesting, your Honor, obviously, for the antitrust purposes of this lawsuit, which is based on a fair distribu-

tion system to the members, that the present system is so unfair that the current writer is absolutely destroyed.

To give you a further idea, your Honor, this contribution of $2,000,000 from the 100 great writers, that was thrown into a pot, where do you think it was thrown? It wasn't [fol. 472] thrown into current performances at all. That alternative was restricted. You could only get the benefit of that $2,000,000 if you took the second plan, not the first, so that you have not only 60 per cent of the take but 60 per cent less $2,000,000, because that portion of it is not available to you.

We have very definite notions about what should be done. I really believe that if we had a person of the quality of Senator Ives as a referee in this case to hear all parties that there would emerge a fair basis, because I think this, your Honor—

The Court: No, that can't be done. There can be no delegation of judicial authority.

Mr. Eastman: Well, your Honor, I sincerely feel that—

The Court: That is out. When I mention a man of Senator Ives' standing and ability, perhaps I was a little presumptuous, having spoken to him, for Judge McGeoghan. I gave expression to my choice because I had great admiration, but their function here would be very limited, and it would be limited to simply finding and ascertaining if the law allowed whether or not the decree was working out as we all anticipated, and whether or not there should be changes in the matter of the survey. That is all I had [fol. 473] in mind.

Mr. Eastman: What I am suggesting is what you are now being asked to approve is not an improvement at all, it is a deterioration of the 1950 decree. Here we have serious authors and composers who cherish ASCAP, ASCAP was their lifeline, and it takes a great deal of courage to come in here and complain about ASCAP. But these writers, who represent 25 per cent of the current ASCAP hits, feel they are being discriminated against in the most awful fashion.

The Court: Don't they have this option? Suppose they don't want to stay with ASCAP? Can't they withdraw?

Mr. Eastman: Where will they go, your Honor?

The Court: There are a number of others in the field.

Mr. Eastman: They love ASCAP. This is their home, and they want to stay with ASCAP.

The Court: Let's not talk about sentiment too much when business and dollars and cents are involved.

Mr. Eastman: Your Honor, we are talking about money. It is like people said "I hate Roosevelt." Other people said, "Why don't you go to Canada?"

There is no place to go. They are orphans. They are [fol. 474] stuck with ASCAP. It is a collective society. I know the word "collective" isn't fashionable, but there it is.

The Court: I don't know it isn't fashionable. It depends on what it is applied to.

Mr. Eastman: Even in ASCAP it is called a conspiracy, your Honor. But they are united for a fine purpose, and they are wed to ASCAP, and no place else.

BMI, the other system, doesn't recognize writers, your Honor, in terms of a fair payment. They have no place to go but ASCAP. If there were an equivalent society, well, it might be realistic to say they can go to another society, but BMI is essentially a publishers' society, has no place for writers, writers don't get a fair shake at BMI.

The Court: I am not concerned with that now.

Mr. Eastman: All I am suggesting, your Honor, is that there is no place for them to go.

The Court: But, you know, the thought comes to my mind that if you people who are members of ASCAP can't agree amongst yourselves as to what is fair, when the government has made an impartial study and recommends it, you might wind up with no association at all, and you will all have something to worry about.

[fol. 475] Mr. Eastman: Your Honor, that is a threat—

The Court: And that is something you might turn over in your minds.

Mr. Eastman: Your Honor, that has been the threat used by—

The Court: No, that is no threat. I have no interest in this thing at all.

Mr. Eastman: I know that.

The Court: It is just an observation.

Mr. Eastman: The government never hurt us. The government never hurt our committee. They bought a system which is so totally improper, and really it doesn't make sense, because ASCAP is a great society if it would use its brains and not get involved so much with favoring a few as against the large group.

The Court: There are a couple of decisions, you know, that seem to indicate that even ASCAP under the consent decree is skating on thin ice.

Mr. Eastman: I recognize that, your Honor. It took great courage to come here on behalf of this committee, because they do not want to do anything to hurt ASCAP.

The Court: It did not take courage to come in any district court of your country and speak up. They have a [fol. 476] forum here. Have you anything else you want to point out to me?

Mr. Eastman: I want to summarize, your Honor, this comes down then to a very simple affair, that under the new proposed order this group of serious writers is in poorer bargaining position than under the decree of 1950; that the alternatives are not fair alternatives; and that the order does not set forth a distribution system which provides for primary consideration for performances.

The Court: All right, sir. Thank you.

Mr. Eastman: Thank you, your Honor.

The Court: Mr. Cheyette?

Mr. Horsky?

What I was going to suggest is that if there are any other lawyers from out of town, I would like to hear them this afternoon, in case they wanted to go back. For instance, Mr. Schaeffer is from Chicago.

Mr. Fishbein, you are from New York, aren't you?

Mr. Fishbein: Yes, sir.

The Court: So you would deal through Mr. Schaeffer, wouldn't you?

Mr. Fishbein: I would.

The Court: And Mr. Rothstein, Mr. Zissu, are from New [fol. 477] York, and Mr. Niles and Mr. Kaufman.

Suppose then as a courtesy to Mr. Schaeffer, being that

he comes from Chicago, we hear him after Mr. Horsky. Is that all right?

All right, Mr. Horsky.

STATEMENT BY MR. HORSKY

Mr. Horsky: Your Honor, I have preliminarily somewhat the same reservations about this case that Mr. Dean expressed. He has had at least the advantage of probably two or three years of experience with it. I have had perhaps a tenth or less time, and I will speak with some trepidation before a group that is much more knowledgeable about this than I. I hope, however, I can contribute a little something more by way of what I say to your Honor's understanding of the true issue that is really before you.

First, let me recall very briefly what this whole basic proceeding is. It began with a complaint by the Department of Justice alleging, in effect, two conspiracies, or perhaps one large conspiracy with two objects. The first conspiracy related to the monopolization or attempted monopolization of the musical works of the country, and related to ASCAP's dealings with its licensees, or people who wished to be its licensees.

The Court: Excuse me, you gentlemen who have come [fol. 478] in, there are seats in that front row, aren't there? You don't have to stand there.

Excuse me, sir.

Mr. Horsky: Surely.

This problem was resolved by the 1941 decree, touched on again in the 1950 decree, and is not now before your Honor at all. We can put that all to one side.

The second part of the 1941 consent decree, the second part of the government's 1941 complaint, if I can put it that way, related to an internal conspiracy inside ASCAP, a conspiracy by the dominant people in the Society to utilize their position in the Society to advantage themselves competitively against the other members of the association.

Let me interpolate by saying I am going to speak on behalf of publishers, and I will talk about the publisher part of the problem, not the writer part of the problem.

Now, in the 1941 decree there was an attempt made, as

the government has outlined, a modest attempt to prevent this anti-competitive conspiracy inside the Society from continuing to function. It was a very mild attempt because, I suspect, the focus of the Court was largely on the external [fol. 479] activities of the Society rather than the internal.

Within nine years it became apparent that the 1941 decree was inadequate, and it had to be fixed up with respect to this internal conspiracy, and some efforts were made to improve the situation.

Most of the problems remained really unsolved because the language was made too general, as the government suggested. It really did not do it.

So, we come before you now to deal with only that problem, the problem of the internal arrangements of the Society.

The Court: That is right. Now, at this point—I don't want to interrupt you,—

Mr. Horsky: Do, your Honor.

The Court: You are very experienced in the field of antitrust litigation. Suppose now I say there is essential discord in ASCAP itself, and among its members. Suppose I say it is not part of the Court's function to attempt to regulate by means of a consent decree, a decree which is not agreed to by a substantial portion of its members, and I deny approval of this decree? What do you think is going to happen then?

Don't you think then that the government will open its [fol. 480] case, and proceed to trial, and say, "Well, we offered you the opportunity of a consent decree that was workable, and which would serve our aim and our purpose. We spent some time with you to try to work it out. You couldn't agree amongst yourselves on what you were willing to take as satisfactory. Now, we are going to go to trial and let a court decide this issue."

At that stage, what do you think is ultimately going to happen to ASCAP? You don't have to be a magician to dope that out, do you?

Mr. Horsky: I have a very different opinion than what I think you are suggesting.

The Court: Do you see what I have in mind? Either ASCAP comes in and says, "Here, we will do what the gov-

ernment wants, and we won't ask the Court to bother too much about our internal affairs, we will work those out and iron them out amongst ourselves," or the government is going to say, "Well, we tried."

The Court is liable to say, "There is such a sharp conflict here that maybe this thing ought to be litigated."

Have you ever thought of that?

Mr. Horsky: Yes, sir. I have an answer to that, and I [fol. 481] want very much to be able to say it.

The Court: What do you think will happen to ASCAP in that event?

Mr. Horsky: I want to correct one impression that underlies your assumptions, which is basic to the position that I am making here.

The Court: This is no assumption. These are all hypothetical situations.

Mr. Horsky: No. You have made an assumption, your Honor, I beg your pardon, and that is that the government has been negotiating with ASCAP. It hasn't been negotiating with ASCAP.

The Court: Now, wait a minute.

Mr. Horsky: Let me explain that.

The Court: Wait a minute. There we are hitting something very vital.

Mr. Horsky: That is right, and that is the reason I want to explain it.

The Court: And which I basically differ with you on. These members have associated themselves in a group. Now, either they have designated somebody to act for them or on their behalf or they haven't. If they have never designated anybody to act for them or on their behalf, we have no consent decree which we can modify, and there is [fol. 482] nothing now before the Court.

Either ASCAP has a governing body or a representative body, or it hasn't. And if you maintain that those men who in the past have appeared on behalf of the Society as a juristic entity have done so without authority, there is nothing before this Court whatsoever.

Mr. Horsky: I want to explain that, your Honor. I realized that statement would shock you and—

The Court: It does not shock me at all, but it follows

with certain logical consequences that there is nothing before me now.

Mr. Horsky: Let me explain it, sir. The challenge that the government made in 1941 was what they called the dominant members of the Society. Let me call them, for convenience, the top 12 members in point of reference. They were misusing the Society for their own purposes. That was the charge. Efforts were made in some decree from prevent them from doing that.

The purpose of this proceeding in 1959 is to prevent them from continuing to do that.

Now, the negotiations have been with the top 12. The issue in this case is whether these top 12 have given up enough of the power which the government says they ille- [fol. 483] gally possess, and improperly possess, so that you can get a fair administration of the Society. This has been negotiated by people who are accused of violating the antitrust laws by overreaching their competitors, who are the other members of the Society.

The Court: Mr. Horsky, don't you miss, and don't you just skip over, the basic question, and that is: Is ASCAP a juristic person performing?

Mr. Horsky: ASCAP is before you as a juristic person. Also, all of its members are before you.

The Court: There we differ.

Mr. Horsky: They were named in the complaint.

The Court: I do not care whether they were named in the complaint or not. They may be named in the complaint as independent and separate conspirators, and as co-conspirators.

Mr. Horsky: Co-conspirators.

The Court: But if ASCAP is a juristic entity, then I only hear you as a matter of courtesy, as a friend of the Court. If it is not a juristic entity, I have nothing before me upon which to act.

Mr. Horsky: Well, it is before you, your Honor, clearly, because it was a defendant in the original case. This proceeding is designed to modify a decree entered in 1941, and [fol. 484] amended in 1945, in a case where the complaint is on file here.

The question we raise, and the reason, your Honor, to be perfectly frank about it, the reason we sought to intervene, is because we do not believe that these people who have negotiated the decree can adequately represent the interests of the other members of the Society whom they stand accused of having improperly dealt with in the past. I represent the people—

The Court: Isn't that a matter to be determined in some state court litigation?

Mr. Horsky: No, sir. That is before your Honor. That is exactly what these questions are. These questions are whether these provisions, which cut down the power of the top 12 publishers, by a considerable amount, are cut down far enough. That is the problem, your Honor.

Now, let me answer the other part of your question, because I think it is important. You say what would happen if you should reject this decree?

The Court: Yes.

Mr. Horsky: It seems to me that it is probably in this posture at that point. The government unquestionably has [fol. 485] the power, as your Honor pointed out a moment ago, to come into this court and seek a modification of the consent decree. It does not have to have the consent of the defendants to do it. If it does that, there will be a hearing before your Honor, there will be testimony taken, there will be evidence, witnesses, exhibits, and whatnot, and your Honor will decide whether the government's proposed modification should be approved or should not be approved.

At that point, I would hope that we would be allowed to participate as intervenors, also, but that would be another question. That seems to me to be what is the alternative. It is not necessary for your Honor to find ASCAP the dominant group that has negotiated this consent to this decree in order to have power to act. I take it even under the present posture, you are not regarding this as something you must accept or reject without dotting an "i" or crossing a "t".

The Court: I certainly do. I do not believe that I am an arm of the Attorney General's office. I function as an independent.

Mr. Horsky: You accept this?

The Court: No. I function as an independent judicial officer.

[fol. 486] Mr. Horsky: That is right.

The Court: However, the proposed decree provides that it shall be submitted, or the way it is going to be signed, if it is signed, it will have to be consented to by the ASCAP membership.

Mr. Horsky: That is right.

The Court: It will have to be voted on by the ASCAP membership, wouldn't it?

Mr. Horsky: That is right.

The Court: Not by the board of directors.

Mr. Horsky: It is voted on by a board that has a weighted vote.

Let me come to that. Let me explain how this voting works.

There is no question at all that at the moment the top 12 publishers—and I am talking about publishers now, and I want to be clear about that. These top 12 publishers have a majority of the total vote of the Society. If they negotiate this decree, and your Honor should say, "Well, all right, if it is approved by ASCAP it is okay with me," they have got the vote to put it over whether anybody else cares or not.

I am talking about 1 per cent of the publishers in this Society. They have 63 per cent of the total votes.

[fol. 487] Now, you say it is submitted to ASCAP for their approval. It is hardly a fair characterization of the situation to say that it is submitted to ASCAP, when you have a weighted vote.

Let me call your attention from time to time to the memorandum we have submitted. It is a long mimeographed business here.

The Court: Yes, I have it here.

Mr. Horsky: Dated October 19th. And it has a few statistics and figures in it.

Let me say, parenthetically, that it is rather difficult to proceed in this case because there is not any record, there aren't any facts, there is not any material upon which you can talk. However, we have been fortunate in obtaining from the board of directors at ASCAP some figures. We

also had the fortune of having a hearing before a Congressional committee a year ago at which much testimony was taken, under oath some of it, a lot of exhibits were supplied, and we have liberally footnoted the statements in this brief to the statements and to the evidence, if we can call it that, adduced before the Congressional committee.

The rest of the material stated in here as fact is material that we are prepared to prove by testimony or ex-
[fol. 488] hibits, if we are afforded the opportunity in this matter.

The Court: I understand that is no offer of testimony made here by anybody, and ASCAP's position is that if the Court undertakes to take testimony it wishes to withdraw any consent, tentative or otherwise, which it may have given. Is that correct, Mr. Dean?

Mr. Dean: That is correct, your Honor.

Mr. Horsky: If you will look at the bottom of page 16, your Honor, you will find, roughly speaking, the traditional 10 members of the board have, since 1954, controlled—received that portion of the revenue which, since voting, is directly related to revenue. It means that they have had a majority of the total votes of the Society.

I cannot emphasize too strongly that when I speak for these applicants that I represent I am not speaking for—I have no connection with the top 10 members, I am speaking for people whom the government alleges it is protecting against those top 10 members.

The statement that your Honor made in denying my motion for leave to intervene was that I had joined the Society, and I must be bound by it. Well, in a sense, of course, that is true. But in another sense, and in a much more [fol. 489] realistic sense, I submit, you have before you the problem of whether to approve this order. You have the power to do complete equity, and I am sure you are anxious to do equity.

The Court: I have that power, but I want to point this out to you, Mr. Horsky.

Mr. Horsky: Yes?

The Court: My power is limited to the exercise of judicial discretion, to either approve or disapprove. I cannot compel either one of the parties to this suit to give their